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IN THE

Supreme Court of the United States

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., UST INC.,

Petitioners,

v.

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether liability under section 2 of the Sherman Act, 15 U.S.C. § 2, may be based on a manufacturer's misleading "suggestions" and "recommendations" to retailers where there is no foreclosure of the competitive process or of a substantial portion of the market.

2. Whether the largest damages award in the history of the antitrust laws ($1.05 billion) may be imposed without disaggregating the effects of lawful competition or other marketplace factors and without linking plaintiff's injury to any antitrust misconduct.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners United States Tobacco Company (now U.S. Smokeless Tobacco Company), United States Tobacco Sales and Marketing Company Inc. (now U.S. Smokeless Tobacco Brands Inc.), United States Tobacco Manufacturing Company Inc. (now U.S. Smokeless Tobacco Manufacturing Limited Partnership), and UST Inc. make the following disclosure:

> Petitioner UST Inc. is a publicly owned corporation, the stock of which is traded on the New York Stock Exchange as "UST." U.S. Smokeless Tobacco Company is a direct wholly owned subsidiary of UST Inc. U.S. Smokeless Tobacco Brands Inc. is a direct wholly owned subsidiary of U.S. Smokeless Tobacco Company. U.S. Smokeless Tobacco Manufacturing Limited Partnership is a partnership, the two partners of which are direct wholly owned subsidiaries of U.S. Smokeless Tobacco Company.

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OPINIONS BELOW

The Sixth Circuit decision from which this appeal is taken (App. 1a) is reported at *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002). The district court opinion denying petitioners' post-trial motion for judgment as a matter of law and motion for a new trial, or in the alternative, a reduced damages award (App. 46a), is reported at 2000 U.S. Dist. LEXIS 12797 (W.D. Ky. Aug. 10, 2000).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 15, 2002. A timely petition for rehearing was denied on July 19, 2002. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, and section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), are reproduced at App. 78a.

INTRODUCTION

In a sweeping decision with profound implications for antitrust policy and competition, the Sixth Circuit applied section 2 of the Sherman Act to condemn a dominant firm's legitimate business conduct and to impose Brobdingnagian damages of $1.05 billion without showing that defendant's conduct impaired competition and without limiting the damages award to the unlawful conduct of the defendant. In conflict with the Fifth Circuit's decision in *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999), the court condemned aggressive nonprice competition that is integral to the everyday competitive process. The Sixth Circuit's ruling that defendant's conduct harmed competition directly conflicts with decisions in several circuits requiring proof of "substantial foreclosure" of the marketplace. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 87 (D.C. Cir.), *cert. denied*, 122 S. Ct. 350 (2001). Moreover, contrary to the Eighth Circuit's decision in *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir.), *cert. denied*, 531 U.S. 979 (2000), and the Ninth Circuit's decision in *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998), the Sixth Circuit upheld a damages judgment that failed to disaggregate the effects of lawful competition or other marketplace factors and that failed to link the claimed injury and damages to any specific illegal monopolization conduct.

Defendant, the leading manufacturer of moist snuff, aggressively marketed its products to retailers in the 1990s through category management services, innovative display racks, and customer incentive programs. Plaintiff, the second

largest manufacturer, asserted that defendant misled retailers through category management recommendations, duped store clerks into using defendant's exclusive display racks (which housed all competitors' products), used incentive payments to gain in-store advertising advantages, and removed plaintiff's display racks and in-store advertising without retailer authorization. Ignoring contrary authority from other circuits, as well as this Court's admonition not to federalize state tort law, the Sixth Circuit found that section 2 liability may be based on a monopolist's "misleading" sales practices and tortious acts when carried out with the intent to increase sales at the expense of rivals. Also in conflict with several circuits, the court found harm to competition without requiring proof that plaintiff was foreclosed from participating in the competitive process or that a substantial portion of the market was foreclosed to the competitive efforts of plaintiff and other firms.

In upholding the jury's unprecedented damages award, the Sixth Circuit ignored basic requirements approved by other circuits that antitrust damages (i) disaggregate the effects of lawful competition and other marketplace factors affecting plaintiff's sales and (ii) link claimed injuries to specified antitrust misconduct. By rejecting these limiting principles, the Sixth Circuit trivializes the antitrust injury requirement of section 4 of the Clayton Act and invites unbounded damages awards that force a defendant to pay for injuries for which it is not responsible.

The decision below warrants review because it abolishes principled limits and strict judicial oversight of private treble damages actions. Left undisturbed, the Sixth Circuit will become a haven for massive antitrust damages claims based on little more than aggressive or unfair nonprice competition by dominant firms. That will chill competition, not promote it.

STATEMENT OF THE CASE[1]

Conwood, the plaintiff-respondent, filed this private treble damages action against USTC, the defendant-petitioner, for antitrust violations and damages that it asserted occurred between 1990-97 (the alleged violation period). The jury found USTC liable for a violation of section 2 of the Sherman Act and awarded damages of $350 million which the district court trebled to $1.05 billion.

1. The Parties And The Changing Demands Of Retail Customers

Moist snuff is a smokeless tobacco product sold in retail stores throughout the country. USTC's primary brands are Copenhagen and Skoal, and Conwood's is Kodiak. In addition, Swedish Match North America, Inc. ("Swedish Match") produces Timberwolf, a discount brand, and Swisher International Group ("Swisher") sells niche brands.

Approximately 300,000 retail stores offer moist snuff. App. 23a. Chain stores, mass merchandisers, drug stores and convenience stores account for approximately 60% of sales. The relationship between moist snuff manufacturers and retailers changed in the early 1990s when retailers requested expanded services to help them use product space more efficiently, control inventories, and increase profitability. *Id.* at 6-7a.

Retailers uniformly testified that they retained the decision-making authority over the products, displays and point-of-sale advertising ("POS") in their stores, and Conwood's Chief Executive Officer, William Rosson, acknowledged that "he could not name one store that gives final decision-making power over its snuff section to his company's competitors."

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[1] The parties listed in the caption, *United States Tobacco Company, et al.* and *Conwood Company, L.P., et al.*, are referred to herein as "USTC" and "Conwood."

Retailers were not bound by long-term exclusive contracts; they testified that they controlled the products, display racks and POS in their stores. *Id.* at 26a.

a. Category Management

Category management is an industry practice used by retailers to make optimal shelf space and product assortment decisions based on analyses of sales data and other market information. Manufacturers become involved in the process by making suggestions and recommendations and by challenging their rivals' proposals. Retailers test these suggestions against their own independent analyses and make the final decisions. *Id.* at 7a. Conwood did not offer category management services. *Id.* at 6a n.1, 7a.

No retailer testified that USTC abused its category management position. However, interpreting documentary evidence, Robert Blattberg, a Conwood expert, testified that in certain "instances" USTC misled retailers with false data. *Id.* at 10-11a. He asserted that USTC had violated the trust of the category management relationship by seeking to control rival distribution, limit the growth of competitors' price-value brands, and increase USTC's distribution and sales at the expense of its competitors. *Id.* at 10-11a, 27a.

b. Competition For Rack Innovation And Placement

Many retailers in the early 1990s (particularly chains) requested that manufacturers design display racks to house the moist snuff products of all companies in a single rack—so-called "exclusive racks"—to reduce shelf space, facilitate inventory control and display all brands uniformly. *Id.* at 6a. USTC and Swisher offered these racks and won exclusive rack competitions at several chains, including K-Mart (Swisher) and Wal-Mart (USTC). In contrast, Conwood did not develop an exclusive rack, and therefore did not par-

ticipate in these competitions. *Id.* at n.1. A manufacturer providing an exclusive rack often obtained a competitive advantage by placing its POS on the rack's header card. *Id.* at 5-6a.

Chain store witness testified that USTC did not remove any racks without permission and did not mislead their store personnel. Conwood, however, presented testimony from its sales personnel, several former USTC employees, and four small retailers, and documentary evidence that some USTC sales personnel removed Conwood racks without permission and that some of USTC's rack placements were obtained by "misleading" or "dup[ing]" inattentive store clerks. *Id.* at 12-15a, 22a. Conwood sales personnel also testified that they spent substantial time reinstalling racks, products and POS. Mr. Rosson testified that Conwood spent $100,000 per month to replace up to 20,000 racks across 300,000 stores. *Id.* at 12a, 25a.

Conwood challenged the legality of all USTC exclusive rack agreements with retailers, including the *authorized* removal of thousands of Conwood racks that resulted from approved store resets made in response to retailer requests and that followed accepted business practices. JA 1271-74, 2771-77; *see also* App. 6a n.1. Conwood admitted that retailers often switched back and forth between exclusive and multiple rack formats, JA 2801, and its sales representatives testified that they were successful 95% of the time in persuading stores using exclusive racks to return to a multiple rack format. App. 13a. Conwood did not present any evidence showing the number or location of racks removed without retailer authorization. Nevertheless, the Sixth Circuit concluded that a jury could infer that USTC's unauthorized removals of Conwood's racks, products and POS were "pervasive." *Id.* at 30a.

c. Retailer Incentive Programs

In the 1990s, moist snuff manufacturers, again except for Conwood, offered incentive programs for retailers. USTC's Customer Alliance Program ("CAP") was typical. For a payment of 3-8¢ per 10-can roll sold (less than 0.3% of the wholesale price), retailers collected sales data for USTC, participated in USTC promotions, and granted preferred rack or POS placement to USTC. *Id.* at 12a. These agreements were without term and retailers could cancel them without penalty. CAP payments were based on sales and not on the number of USTC products stocked by the retailer. JA 2995-97.

2. The Performance Of Conwood And Its Rivals In The 1980s And 1990s

By 1983, four years after Conwood first entered the market, its products achieved a 7.7% national market share. Thereafter, its performance leveled off. Conwood gained only 2.9 percentage points between 1983-90 (the comparable non-violation period) and 3.0 points between 1990-97 (the alleged violation period). JA 2787. In the 1980s and 90s, USTC's national market share dropped from 97 to 77%. During the alleged violation period, the collective market share of USTC's competitors nearly doubled. JA 2786; *see* JA 3768-70.

Overall output of moist snuff increased sharply during the 1990s with sales of moist snuff reaching 135% of their 1990 level and the number of brands increasing from 28 to 40. In 1994, Swedish Match introduced Timberwolf, which captured 7% of the market within four years. Moist snuff manufacturers increased their sales, profits and prices in the 1990s. Conwood's profit margins increased substantially during the 1990s, JA 3787-90; its margins in moist snuff were substantially higher than any other segment of its business, JA 3796-98; and its return on equity soared from 33 to 75% between 1991-98. JA 3794.

3. Plaintiff's Damages Evidence

a. Dr. Leftwich's Analysis

In support of its claim for as much as $488 million in pre-trebled damages, Conwood offered the testimony of Dr. Richard Leftwich, an expert in business valuation. Leftwich was asked to test Conwood's hypothesis that USTC's misconduct across state lines in the 1990s prevented Conwood from increasing its market shares in the states in which it had not performed well in the 1980s—i.e., where it had not established a foothold (so-called "low share" states). The hypothesis assumed that Conwood's ability to compete in states in which it had achieved a foothold as of 1990 (so-called "high share" states) was not significantly affected by USTC's alleged misconduct. Based on conversations with Conwood personnel, Leftwich defined a foothold state as one with a market share of at least 15 or 20% as of 1990, App. 16a, thereby creating a range of 34 to 46 low share states. (Leftwich's data included the District of Columbia and all states except Alaska and Hawaii.)

According to Leftwich, he tested this foothold hypothesis by examining whether Conwood's market share growth by state in the 1990s correlated with the 1990 starting points. *Id.* at 16a, 40a. His basic study was limited to three simple linear regressions. First, he tested whether Conwood's moist snuff market share increases by state in the seven year alleged violation period (1990-97) were correlated with their 1990 starting points. JA 1103. He concluded that they were (i.e., if Conwood's share for a state was low in 1990, it tended to stay that way; if it was high in 1990, it continued to grow more rapidly thereafter). Second, he ran the same test for the six year pre-violation period (1984-90), his version of a before and after test. This second regression did not reveal the same correlation (i.e., Conwood's 1984-90 growth by state was not correlated to the 1984 starting points). JA 1106. And, third, he ran a regression for the looseleaf market, a

smokeless tobacco market in which USTC did not compete, his version of a yardstick test. That test did not reveal any correlation between Conwood's 1990 starting point in looseleaf shares and its performance to 1997. JA 1107.

Based on these regressions, Leftwich found that those states in which Conwood's moist snuff gained a foothold in the 1980s continued to do well in the 1990s, while those states in which it did not have a foothold did not grow as well. He concluded that the data pattern he saw was consistent with Conwood's hypothesis—that it was USTC's alleged misconduct that kept Conwood from growing where it did not have a foothold as of 1990.[2] App. 17a, 40a. Further, because Conwood's hypothesis assumed that, but for USTC's misconduct, its market share in all low share states would grow just as much as in its most successful states during the 1990s, Leftwich's damages calculation added share points to the baseline of each low share state—8.1 points (under the 20% foothold threshold) and 6.5 points (under the 15% foothold threshold). JA 1111-13. As a result, Leftwich estimated damages of $313 or $488 million before trebling. App. 17a, 43a.

b. Mr. Rosson's Estimate

In addition, Conwood's Chief Executive Officer, William Rosson, testified that in his opinion Conwood would have achieved a 22-23% national market share by 1997 but for USTC's tactics—a figure almost 10 points higher than the shares Conwood in fact achieved for that period and triple the growth it had achieved prior to the alleged violation period

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[2] Leftwich tested whether various demographic factors (age, income, etc.) had a disproportionate effect on Conwood's self-defined low share states. However, he did not test whether other marketplace factors (e.g., competition from Timberwolf, marketing restrictions in various states) that affected Conwood's sales in the 1990s disproportionately affected Conwood's low share states. JA 1140-46.

(1983-90).[3] Rosson also testified that each percentage point was worth $10 million annually and that Conwood therefore was entitled to $400 million in damages. *Id.* at 15a.

4. The District Court's Rulings

Conwood alleged that USTC had engaged in exclusionary conduct by below-cost pricing, exclusive dealing, coercion of retailers, and rack innovation as a form of predation. Compl. ¶¶ 27-28, 30. These allegations were not pursued by Conwood at trial. Instead, it asserted that USTC had misled retailers to obtain exclusive rack placements, had removed Conwood racks without retailer authorization and had provided misleading data to influence retailers' shelf space and product assortment decisions. The court held, at the summary judgment stage, that it was up to the jury to decide whether such conduct violated section 2. It also found that Conwood did not have to offer any economic proof of the extent of market foreclosure from USTC's alleged misconduct.

The trial court denied USTC's *Daubert* motion challenging the admissibility of Leftwich's study and testimony, finding that he had used "generally accepted" methodologies and that his opinions were for the jury to consider. It also rejected the argument that Dr. Leftwich was required to disaggregate the effects on Conwood sales flowing from lawful conduct or other marketplace factors. Instead, it found that because the jury awarded damages in Leftwich's "mid-range," it must have "adequately considered only those damages that were a direct result or likely consequence of UST's unlawful conduct." App. 55a.

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[3] Conwood's national sales manager also testified that Conwood's sales were higher than its national average in retail locations that did not use USTC exclusive racks. App. 16a. That testimony made no distinction between Conwood's low share or high share states as defined by Dr. Leftwich.

5. The Sixth Circuit's Decision

The Sixth Circuit affirmed, holding that USTC's misleading category management practices and exclusive racks obtained by ruse or tortious acts violated section 2 when carried out with the intent of maintaining USTC's market share at the expense of its smaller rivals. Notwithstanding the retailers' requests for USTC's category management services and incentive programs, the court found that USTC had not presented a valid efficiency justification for its conduct.[4] In finding that USTC's tortious rack and POS removals were "pervasive," the court asserted that there was "no indication that" the removals "were authorized by the stores at which they occurred." App. 25a.

The court relied on expert testimony that USTC "used its position as category manager to exclude competition by suggesting that retailers carry fewer products, particularly competitor's products"; that it attempted to "control the number of price value [discount] brands introduced in stores"; and that USTC acted unlawfully "by suggesting that stores carry its slower moving products instead of better selling competitor products." The court found this to be "probative of USTC's intent to exclude competition." *Id.* at 26a. It cited evidence that USTC "misused its position as category manager by providing misleading information to retailers in an effort to dupe retailers into believing, among other things, that USTC products were better selling so that retailers would carry USTC products and discontinue carrying Conwood products." *Id.* at 22a. The court acknowledged, however, the uniform testimony of retailers that they tested all data, reviewed all manufacturers' recommendations, and otherwise made all decisions for their stores. *Id.* at 26a.

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[4] The Sixth Circuit nevertheless recognized that USTC's exclusive rack placements often resulted from winning rack competitions requested by major retail chains in which Conwood chose not to participate. App. 6a n.1.

The court rejected USTC's argument that Conwood failed to show that competition was "foreclosed." *Id.* at 18-19a. The court did not identify any standard for assessing foreclosure but rather noted that Conwood was disadvantaged by USTC's tactics. It found that but for USTC's conduct, the market "would have grown more" and would have increased consumer choice. *See id.* at 33-34a. The court further found that Conwood's damages presentation satisfied *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), because Leftwich had used "generally accepted methods for proving damages." Finally, the court ruled that the jury could be presumed to have followed the court's instructions relating to disaggregation. The Sixth Circuit therefore upheld the $1.05 billion damages judgment. App. 22a, 26a, 28-29a & n.4, 39-42a.

ARGUMENT

Nearly ten years ago, when faced with confusion and conflict about the permissible scope of *price* competition, this Court declared in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223-24 (1993), that price competition by dominant firms essentially was *per se* lawful as long as the defendant's prices were above some appropriate measure of cost or recoupment was improbable. The Court's stated antitrust policy was specific and certain: aggressive price competition by firms with monopoly power was not to be deterred unless it was clear that competition would be significantly impaired for the long term.

This case presents the Court with an opportunity to resolve a conflict in the circuits regarding the legal boundaries of *nonprice* competition under section 2 of the Sherman Act. Nonprice competition by manufacturers, which includes offering innovative services, persuading retailers to increase shelf space at the expense of rivals and promoting products through advertising and incentive programs, is the essence of

competition in concentrated markets, especially for branded products. *See generally* Douglas Ginsburg, *Nonprice Competition*, 38 Antitrust Bull. 83 (1993).

The lower courts are in conflict, however, as to when aggressive nonprice competition may rise to a section 2 violation. The root of the confusion lies in the blurred line between "the process of Creative Destruction"[5] caused by everyday nonprice competition and illegal exclusionary conduct. The Fifth Circuit in *Stearns* held that aggressive, even "misleading" nonprice competition cannot be exclusionary as a matter of law when other rivals are free to participate in the competitive process. 170 F.3d at 527. When the Sixth Circuit's opinion is stripped of various forms of misleading conduct, its holding condemns simple tortious acts (rack removals not shown to be authorized) contrary to this Court's admonition that the antitrust laws "do not create a federal law of unfair competition" and that "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." *Brooke Group*, 509 U.S. at 225. Lower courts also are in conflict on what evidence of foreclosure is necessary to prove harm to the competitive process. For even the most preclusive form of nonprice behavior, exclusive dealing agreements, the D.C., Eighth and Ninth Circuits require substantial foreclosure of the market—not just some unspecified reduction in product exposure—before section 2 is implicated.

The Sixth Circuit stands in even starker contrast with its sister courts on the subject of antitrust damages. The decision below absolves a plaintiff of any responsibility to disag-

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[5] *See* Joseph Schumpeter, *Capitalism, Socialism and Democracy* 84 (2d ed. 1947); *see also Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986) ("Competition is a ruthless process.").

gregate the effects of lawful conduct or other market factors or to link its claimed damages to specified antitrust misconduct. Given the enormity of this damages award—the largest private antitrust judgment in the history of the antitrust laws[6]—these conflicts should have given the Sixth Circuit pause to scrutinize plaintiff's damages theory and evidence with special care.

The Sixth Circuit's holding, however, conflicts with rulings by the Eighth and Ninth Circuits. It did not require that plaintiff offer an evidentiary basis for the jury to disaggregate the effects of lawful conduct from the damage award, *see Concord Boat*, 207 F.3d at 1048, 1054; *Image Tech. Servs.*, 125 F.3d at 1223-24, and it did not require that plaintiff test for the most likely alternative explanations for Conwood's poor performance in numerous states or for the causes of its alleged antitrust injuries. *See Blue Dane Simmental Corp. v. American Simmental Ass'n*, 178 F.3d 1035, 1040-41 (8th Cir. 1999). This massive damages award demonstrates what can result when antitrust plaintiffs and their experts are not restrained by principles requiring proof that the defendant was responsible for plaintiff's antitrust injuries. Here their expert admittedly "rolled up" all alleged misconduct "into one ball of wax" (Dr. Leftwich's words, JA 1133-34) without differentiating exclusionary conduct or identifying injuries not caused by defendant's identifiable antitrust misconduct. Had the Sixth Circuit adopted the rulings of the Eighth and Ninth Circuits, the damages would not have included the effects of competition itself.

These damages conflicts reflect the absence of recent guidance from this Court. Its primary antitrust damages rulings are limited and dated. *See Zenith Radio Corp. v. Hazeltine*

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[6] The only larger private antitrust judgment was overturned on appeal. *See MCI Communicaitons Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1982).

Research, Inc., 395 U.S. 100 (1969) (antitrust damages based on yardstick test); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) (recognized application of yardstick and before-and-after tests); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) (proof of lost earnings based on price presentations and executive's reasonable estimate of plant's market value). *See also J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (automatic damages not available in private secondary line Robinson-Patman Act actions). However, antitrust treble damage actions have greatly expanded in number and scope in the last 33 years. They now constitute almost 95% of all antitrust cases and the lure of treble damages has induced plaintiffs to convert ordinary tort or contract disputes into antitrust claims. *See* Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, ch. 17 (2d ed. 1999) (summarizing literature); Phillip Areeda & Herbert Hovenkamp, 2 *Antitrust Law*, ¶ 340 (2d ed. 2000) ("*Antitrust Law*"); Frank Easterbrook, *Treble What?*, 55 Antitrust L.J. 95 (1986). Moreover, advances in the use of economics and statistics to assess causation and damages have increased the sophistication and complexity of expert testimony which in turn requires closer review by trial and appellate courts.

I. THIS COURT SHOULD RESOLVE THE CIRCUIT CONFLICT ON THE BOUNDARIES OF LAWFUL NONPRICE COMPETITION UNDER SECTION 2

A. The Sixth Circuit's Condemnation Of Aggressive Nonprice Competition Conflicts With The Fifth Circuit's Ruling In *Stearns*

This Court has outlined workable and objective standards for determining many types of conduct that may be deemed "unreasonably exclusionary" under section 2.[7] Further, in

[7] *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451

Brooke Group, this Court carefully spelled out the criteria for defining predatory pricing; it made clear that unless above-cost pricing (no matter how aggressively pursued) is linked directly to an independent antitrust violation, such conduct cannot violate section 2 as a matter of law. 509 U.S. at 222-23; *see also Concord Boat*, 207 F.3d at 1061-62.[8] This Court, however, has never addressed whether and to what extent section 2 may be used to condemn nonprice activities that are part of the selling process itself. The lower courts have responded with contrary rules; one shackles robust competition, the other encourages it.

In holding that section 2 condemns misleading or unfair suggestions to retailers regarding racks or category management, the Sixth Circuit's *Conwood* opinion conflicts with the analysis of the Fifth Circuit in *Stearns*. In *Stearns* the plaintiff challenged defendant's "orchestrated program" to limit plaintiff's ability to compete for airport jetways by training sales personnel to manipulate bid specifications and mislead buyers on the merits of competing products. 170 F.3d at 521. The Fifth Circuit held that while defendant's conduct may have been "wrong, misleading, or debatable," *id.* at 524, it constituted an economically rational attempt to increase sales for its products, and therefore was legitimate business conduct under section 2 as a matter of law. The court reasoned that where customers receive competing presentations and suggestions and make decisions in their own economic interests, antitrust courts should not interfere. *Id.* at 527.

(1992) (tying); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (refusal to deal); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (tying and exclusive dealing).

[8] Antitrust courts have consistently held that intent is not a sound basis for defining exclusionary conduct under section 2. *See, e.g., Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 231-32 (1st Cir. 1983) (Breyer, J.).

This conflict between the Fifth and Sixth Circuits in *Stearns* and *Conwood* reflects a deep-seated disagreement among the circuit courts over the role of nonprice competition that arguably is misleading or unfair. The Fifth Circuit's rule in *Stearns*, that the antitrust laws do not penalize conduct that is merely unfair, is supported by the Seventh and Eighth Circuits. *See Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Adver. Ass'n, Inc.*, 672 F.2d 1280, 1288 (7th Cir. 1982) (§ 1: "*unfair competition is still competition*, and will be actionable under the antitrust laws generally only where a defendant with substantial market power uses the unfair means to increase its share of the market *by eliminating a competitor*") (emphasis added); *Concord Boat*, 207 F.3d at 1046, 1059, 1062 (no § 2 violation even though defendant "fraudulently concealed" deals and used unfair market share incentive programs).[9] Conversely, the Sixth Circuit in *Conwood* has now joined the Second Circuit in holding that misleading conduct alone can be a basis for section 2 liability. *See National Ass'n of Pharm. Mfrs. v. Ayerst Labs.*, 850 F.2d 904, 916 (2d Cir. 1988) (monopolization claim based on false statements to buyer states a § 2 claim). *See generally* 3A *Antitrust Law* ¶ 782b (collecting and analyzing cases).

It is important that this Court resolve this basic conflict concerning everyday forms of nonprice competition in the retail industry. Courts have long recognized the efficacy of

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[9] The Ninth Circuit also has followed the suggestion in the Areeda and Hovenkamp treatise that plaintiffs may rely on misleading competition to establish § 2 liability only if they overcome a *de minimis* presumption by showing, among other things, false representations that "induce[d] reasonable reliance" and were not "susceptible of neutralization . . . by rivals." 3A *Antitrust Law* ¶ 782b; *see American Prof'l Test. Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 108 F.3d 1147, 1152 (9th Cir. 1997).

aggressive rivalry for shelf space.[10] Moreover, the practice of category management by retailers—which is dependent on manufacturers' suggestions and recommendations (App. 6-7a)—is now an essential aspect of the competitive process. *See* Federal Trade Commission Staff, *Report on the FTC Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry* 47-49 (2001) (finding category management efficiency enhancing and stating that competitive concerns are reduced when retailers check suggestions "against the recommendations of other manufacturers and their own data"), available at *http://www.ftc.gov/os/2001/02/slottingallowancesreportfinal.pdf*. A dominant firm's non-coercive suggestions to retailers regarding which free display racks to use or products to accept should be *per se* legitimate business conduct. Such nonprice competition is economically rational and all rivals are free to compete in the same way without regard to their size. *See Aspen*, 472 U.S. at 605. Under the Sixth Circuit's ruling, however, there is no standard to guide courts or competing firms on the boundary between lawful competition and illegal exclusionary conduct or the criteria that should be applied in evaluating the dominant firm's marketplace conduct.[11] As dominant firms

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[10] *See R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362, 387 (M.D.N.C. 2002) (§ 1 claim); *Jays Foods, Inc. v. Frito-Lay, Inc.*, 664 F. Supp. 364, 370 (N.D. Ill. 1987); *Frito-Lay, Inc. v. Bachman Co.*, 659 F. Supp. 1129, 1134-36 (S.D.N.Y. 1986). *See also Bayou Bottling, Inc. v. Dr Pepper Co.*, 725 F.2d 300, 304 (5th Cir. 1984).

[11] Because the Sixth Circuit did not base liability solely on instances of unauthorized rack removals (simple torts), this Court need not address whether such conduct, alone, may form the basis of § 2 liability. Moreover, to the extent the decision appears to aggregate procompetitive conduct (innovative racks requested by retailers, CAP and everyday suggestions and recommendations) with torts to create § 2 liability, that approach is contrary to the Ninth Circuit's decision in *California Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727, 738 (9th Cir. 1979). In any event, even a ruling that torts alone are sufficient to find § 2 liability should include a requirement that the plaintiff prove market foreclosure.

are forced to lead the "quiet life," market efficiency and consumer welfare will suffer.

B. The Sixth Circuit's Failure To Require Proof Of Substantial Foreclosure Conflicts With Rulings By Four Other Circuits

The Sixth Circuit's decision also reflects division in the circuits over whether business practices can be condemned without proof of unreasonable and substantial market foreclosure under section 2. The Sixth Circuit ruled that USTC violated section 2 because it "shut Conwood out from effective competition," preventing Conwood from placing racks, products and POS in stores as "true competition" would have allowed. App. 30-34a. However, it is not disputed that plaintiff participated in the competitive process. Nor was Conwood foreclosed from the market (e.g., Conwood's products were in 81% of retail stores selling smokeless tobacco). Instead, the court relied on plaintiff's expert testimony that the market would "have grown more" absent USTC's alleged misconduct. *Id.* at 31a.

The Sixth Circuit's decision to relieve plaintiff of any foreclosure requirement conflicts with the D.C. Circuit's holding in *Microsoft*. There the court examined Microsoft's practices that "severely restricted Netscape's access to those distribution channels leading most efficiently to the acquisition of browser usage share," concluding that "a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation." 253 F.3d at 70 (citation omitted). It ruled that in a section 2 case, plaintiff must prove foreclosure of "a *substantial percentage* of the available opportunities for browser distribution" which was demonstrated by Microsoft's exclusive deals with 14 of the top 15 internet access providers. *Id.* (emphasis added). The First, Eighth and Ninth Circuits apply similar foreclosure

requirements under section 2. *See Barry Wright*, 724 F.2d at 237 (emphasizing importance that foreclosure be properly defined by reference to the entire market; three year fixed-quantity contracts did not constitute "significant foreclosure" because they "extended over something less than [the customer's] expected requirements and lasted about two years"); *Concord Boat*, 207 F.3d at 1063 (dismissing § 2 case because rivals not shown to be foreclosed from any portion of market); *Western Parcel Express v. United Parcel Serv. of Am., Inc.*, 190 F.3d 974, 976 (9th Cir. 1999) (dismissing monopolization claim because the "customer . . . [could] terminate the contract for any reason with very little notice" and "for 'virtually any reason at any time'").[12]

II. THIS COURT SHOULD RESOLVE SERIOUS CONFLICTS IN THE CIRCUITS ON THE PROOF REQUIRED FOR ANTITRUST DAMAGES

The Sixth Circuit's decision upholding this billion dollar judgment creates substantial conflicts with the Eighth and Ninth Circuits on two of the most basic issues in determining antitrust damages: first, whether an antitrust plaintiff must *disaggregate* the effects on plaintiff's sales flowing from lawful competition and other market factors; and second, whether an antitrust plaintiff must *link* its claimed damages to the specified antitrust misconduct.

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[12]Similarly, § 1 of the Sherman Act, 15 U.S.C. § 1, and § 3 of the Clayton Act, 15 U.S.C. § 14—provisions that reach *further* than § 2—require a showing of either actual or likely market foreclosure from unlawful practices. *See Jefferson Parish*, 466 U.S. at 7-8 (foreclosure in the range of 30% insufficient); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) (Posner, J.) (law of exclusive dealing requires a showing that "at least one significant competitor" was kept "from doing business in a relevant market" otherwise "the agreement cannot possibly harm competition").

A. The Decision's Failure To Require Plaintiff To Disaggregate Conflicts With Rulings Of The Eighth And Ninth Circuits

Perhaps the most striking conflict created by the Sixth Circuit's decision is its approval of a jury damages verdict without any evidence that would enable the jury to disaggregate the effects of lawful conduct and other market forces affecting plaintiff's sales in the violation period. Leftwich's damages methodology attributed Conwood's failure to achieve 6.5 or 8.1 points of market share growth in its low share states in the 1990s entirely to USTC's unlawful tactics. His damages numbers of $313 or $488 million were derived from assumptions about the threshold level of a foothold state, rather than by directly measuring and parsing the effects of USTC's conduct or other market factors on Conwood's performance in the 1990s. *See* App. 40-41a, 43a. Indeed, Leftwich acknowledged that his study was incapable of disaggregating the effects of lawful conduct or other marketplace factors.[13] JA 1130-34. The Sixth Circuit conceded that USTC's marketing activities involved lawful industry practices and that other market factors affected Conwood's performance in the 1990s. *See* App. 6a n.1, 28a n.4. It nonetheless upheld the damages verdict, reasoning that because the jury was properly instructed, it is presumed to have segregated the effect of lawful competition from other marketplace factors affecting Conwood's sales. *Id.*

The Sixth Circuit's failure to require plaintiff to present evidence on which the jury could make disaggregation determinations squarely conflicts with the Eighth Circuit's decision in *Concord Boat* and the Ninth Circuit's ruling in *Image Tech. Servs.* In *Concord Boat*, plaintiff's expert study

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[13] While Leftwich asserted that only USTC's antitrust misconduct affected Conwood's growth in low share states, he did not test this counterfactual assumption. JA 1140-46.

assumed that any market share greater than 50% maintained by the defendant was the result of defendant's anticompetitive conduct, and therefore resulted in alleged monopolistic overcharges. There, too, the district court permitted the expert to testify because his methods were generally accepted and defendant was only "complain[ing] about how . . . [the] model [was applied] to the facts of this case." *Concord Boat*, 207 F.3d at 1055. However, the Eighth Circuit reversed, holding that an expert study that failed to disaggregate lawful conduct could not be submitted to the jury. *See id.* at 1057 ("it did not incorporate all aspects of the economic reality of the stern drive engine market and . . . it did not separate lawful from unlawful conduct").

Similarly, in *Image Tech. Servs.*, the Ninth Circuit held that a proper jury instruction could not replace the plaintiff's failure to offer an evidentiary basis for disaggregation:

> The ISOs [plaintiffs] must segregate damages attributable to lawful competition from damages attributable to Kodak's monopolizing conduct. A failure to do so contravenes the command of the Clayton Act. *Although the district court instructed the jury to award only those damages arising from Kodak's monopolization of the service market, the ISOs point to no basis in the record for quantifying lost sales of used equipment caused by Kodak's service monopoly.*

125 F.3d at 1224 (emphasis added) (citations omitted); *accord Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1494 (8th Cir. 1992) ("'When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damages.'") (quoting *MCI*, 708 F.2d at 1162).

In this case, Conwood abandoned its predatory pricing claim, which was based on USTC's pricing practices (now conceded to be lawful) that allegedly harmed Conwood sales.

Moreover, the Sixth Circuit appeared to acknowledge that the provision of innovative racks requested by retailers was procompetitive, *see* App. 6a n.1; that the industry practice of category management (i.e., non-misleading suggestions and recommendations) was lawful and efficiency enhancing, *id.* at 28a; and that USTC's economies of scale, category management and promotional activities were lawful. *Id.* at 28a n.4. The effects of each on Conwood therefore should have been disaggregated. Moreover, it is not disputed that the rapid rise of Timberwolf harmed all of Swedish Match's competitors, and that the introduction of regulations forcing the reduction of available shelf space for moist snuff products harmed all firms including Conwood. In circuits requiring that the jury be given evidence from which it could segregate the effects of lawful competition and other marketplace factors, the record here would require dismissal before trial, *see City of Vernon v. Southern Cal. Edison Co.*, 955 F.2d 1361, 1372-73 (9th Cir. 1992), or rejection on appeal. *See Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 485 (5th Cir. 2000). In the Sixth Circuit, however, these lawful effects may simply be rolled up into the expert's "ball of wax" damages estimate and left for the jury to sort out with no basis for doing so.

B. The Sixth Circuit's Decision Upholding Plaintiff's Theory Of Damages Misinterprets *Joiner* And Conflicts With The Eighth Circuit

Finally, the Sixth Circuit's holding that Conwood had adequately linked its billion dollar plus damages claims to antitrust misconduct baldly misinterprets this Court's decision in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and is contrary to the Eighth Circuit holdings in *Blue Dane* and *Concord Boat*. Leftwich's study tested the relationship of two variables: Conwood's 1990 starting share and its 1990-97 growth by state. He used no variables for the alleged antitrust misconduct to test Conwood's foothold hypothesis; nor did he test that hypothesis for the variables that most likely affected

Conwood's sales in the 1990s. *See* pp. 9 n. 2, 21 & n. 13 *supra*. Instead, Leftwich's conclusion on causation rested solely on the assumption that if Conwood's 1990 starting shares were in some manner uniquely related to its subsequent share growth, then USTC's conduct was responsible for Conwood's continued lackluster performance in the 1990s in 34 or 46 low share states. *See* pp. 8-9 *supra*.

The analytical gap in Leftwich's methodology is as wide as it is fundamental. Misreading this Court's directive that an expert's *ipse dixits* are never sufficient, *Joiner*, 522 U.S. at 146, the Sixth Circuit failed to determine whether the trial court had "carefully and meticulously" parsed Leftwich's study to assess whether it was relevant for measuring Conwood's antitrust injuries. Here, Leftwich's methodology could not link USTC's antitrust misconduct to Conwood's continued lack of growth in the 1990s in its poor-performing low share states of the 1980s. Indeed, his regressions would support equally plausible hypotheses that Conwood's growth in the low share states in the 1990s was suppressed by: (i) the introduction of numerous other rival brands, including a very successful discount product (Timberwolf); (ii) new regulatory restrictions on shelf space; (iii) thousands of retailer product assortment decisions; or, most obviously, (iv) a continuation in particular states of the very factors that caused Conwood's prior slow growth. Leftwich's study was unable to discriminate among any of these alternative causes of Conwood's differential growth or to distinguish them from USTC's alleged misconduct.[14] Leftwich's assertion that these other

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[14] Plaintiff did not solve this defect by importing his self-identified USTC "bad acts" data (derived from employee litigation affidavits) into the model used by USTC's expert. App. 41-42a. Leftwich did not use any data from this hearsay information to test the foothold hypothesis; rather, he used it to adjust 1997 market shares so as to increase his damages estimates. JA 1111-13. Moreover, he conceded on cross-examination that he had no idea whether these bad acts represented authorized or unauthorized conduct. JA 1135-40.

factors did not need to be tested because they were "reflected in the real world market," JA 90, is no answer; his study did not assess whether any one or all of them suppressed Conwood's market share growth in its so-called low share states in the 1990s.

Leftwich's methodology to determine causation also would have been rejected by the Eighth Circuit in *Blue Dane*. There the court affirmed the trial court's exclusion of plaintiff's expert because he had relied on a before and after methodology to prove causation without developing variables to test for other plausible explanations on the record. 178 F.3d at 1040-41. As the Eighth Circuit stated, the issue of a methodology's relevance is not determined by its "general acceptance," but rather by its reasonableness for "'draw[ing] a conclusion regarding the particular matter to which the expert testimony was directly relevant.'" *Id.* at 1040 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 154 (1999)). The court then explained why plaintiff's reliance on a before and after test as indirect proof of the cause of its injuries was defective:

> Although [the expert] utilized a method of analysis typical within his field, that method is not typically used to make statements regarding causation without considering all independent variables that could affect the conclusion. We find no evidence in the record that other economists use before-and-after modeling to support conclusions of causes of market fluctuations.

Blue Dane, 178 F.3d at 1040-41; *see also United States v. City of Yonkers*, 197 F.3d 41, 54-55 (2d Cir. 1999) (rejecting expert's study of racial disparities in test scores because he failed to use a variable that isolated racial discrimination as an explanatory factor). Leftwich's study was similarly defective; he purported to test Conwood's foothold hypothesis without using any variable for other market factors that indisputably affected Conwood's sales in the 1990s, each of

which was just as likely to have a differential impact on states in which Conwood already was performing poorly as of 1990.[15] That Leftwich supposedly tested for all variables "for which he had data," App. 41a, is no justification; in fact, he made no attempt to develop the relevant data.

More broadly, the Sixth Circuit's acceptance of a damages model that is not linked to the specified antitrust misconduct conflicts with the holding in *Concord Boat*. There the court excluded an expert's report that modeled damages without reference to the various marketplace factors affecting plaintiff's sales or to the alleged underlying misconduct. *See supra* pp. 21-22. Similarly here, Leftwich's model created an unreal marketplace in which the reasons for Conwood's unsatisfactory performance in the 1983-90 period were ignored; in which the effects of lawful competition and other market factors in the 1990s were assumed away for lack of data; and in which Conwood's wildly optimistic but for performance projection was based solely on formulaic assumptions built into the model (i.e., the assumption that Conwood's performance in *every* low share state would gain 6.5 or 8.1 market share points in 1990-97). *See McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 807 (9th Cir. 1988) (rejecting testimony of unreasonably optimistic sales projections). And, perhaps most importantly, as in *Concord Boat*, it was not disputed that Dr. Leftwich's rigid damages model

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[15] Nor would it have been particularly difficult for Leftwich to gather the relevant data on USTC's alleged misconduct or other market factors. Plaintiff's own marketing expert compiled a list of chains that selected exclusive racks, and Leftwich could have used these data to test the effects of exclusive racks on Conwood's sales across states. JA 1134-35. Leftwich similarly could have tested the effects on Conwood of Timberwolf's share growth across states or the effects of state regulations affecting available shelf space.

and his massive estimates remained the same irrespective of the identity or legality of some or all of the underlying conduct. JA 1132-46.

If the sufficiency or fit requirements of *Joiner* are to have any meaning in antitrust damages analysis, this Court must resolve the conflict in the circuits in favor of the rule in *Blue Dane* and *Concord Boat*. The Eighth Circuit has articulated clear legal standards for ensuring that antitrust damages are based only on the effects of antitrust misconduct. The Sixth Circuit not only offers no standard by which to undertake that analysis, it fully abdicates this responsibility to the jury.

* * *

The importance of these damages issues and the need for specific guidance from this Court cannot be overstated. Left uncorrected, the Sixth Circuit's systematic bias for Type I errors will impede vigorous competition by dominant firms and provide an open invitation for speculative damages claims. It is "a recipe for uncertainty, unpredictability, and endless litigation." *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J., dissenting).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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October 17, 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-6267

CONWOOD COMPANY, L.P.;
CONWOOD SALES COMPANY, L.P.,
Plaintiffs-Appellees,
v.
UNITED STATES TOBACCO COMPANY; UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC.; UNITED STATES TOBACCO MANUFACTURING COMPANY, INC.; UST, INC.,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Kentucky at Paducah.
No. 98-00108—Thomas B. Russell, District Judge.

Argued: November 27, 2001
Decided and Filed: May 15, 2002

Before: CLAY and GILMAN, *Circuit Judges*; EDGAR, *Chief District Judge*.*

OPINION

CLAY, Circuit Judge. Defendants-Appellants, United States Tobacco Company, United States Tobacco Sales and Marketing Company, Inc., United States Tobacco

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* The Honorable R. Allan Edgar, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

Manufacturing Company, Inc., and UST, Inc. (herein collectively referred to as "USTC") appeal from the March 29, 2000 order, after trial by jury, entering judgment in favor of Plaintiffs, Conwood Company, L.P. and Conwood Sales Company, L.P. ("Conwood") for Defendants' violations of the Sherman Anti-Trust Act, 15 U.S.C. § 2. Conwood alleged that USTC violated the Act by using its monopoly position to exclude competitors from the moist snuff market. We AFFIRM.

BACKGROUND

Procedural History

On April 22, 1998, Conwood filed an eight-count complaint against USTC alleging the following causes of action: (1) Unlawful Monopolization, in violation of § 2 of the Sherman Act; (2) Violations of § 43(a) of the Lanham Act; (3) Tortious Interference with contract; (4) Tortious Interference with prospective advantage; (5) Violations of the Kentucky Revised Statute, § 365.050; (6) Product Defamation; (7) Unjust Enrichment; and (8) Conversion/Trover. USTC filed counterclaims for conversion and violations of the Lanham Act and Sherman Act.

In November 1999, USTC moved for summary judgment as to Conwood's federal claims and dismissal without prejudice as to the pendent state law claims. USTC also filed a motion in limine to exclude the testimony of Conwood's expert witness, Dr. Richard Leftwich, and moved separately to exclude Leftwich's damages study and future testimony during trial. The district court denied USTC's summary judgment motion on February 17, 2000. On February 23, 2000, the district court also denied USTC's motions with respect to Leftwich.

In February 2000, the case proceeded to trial. Before the case went to the jury, Conwood agreed to dismiss the state law claims and both parties agreed to dismiss their respective

Lanham Act claims asserted against one another. The jury deliberated for four hours, returning a $350 million verdict in favor of Conwood. The district court entered judgment on March 29, 2000, and therein trebled the amount of the award to $1.05 billion, pursuant to 15 U.S.C. § 15(a). The jury also ruled in favor of Conwood on USTC's conversion and Sherman Act claims.

Conwood moved for a permanent injunction, pursuant to 15 U.S.C. § 26, to prevent USTC from, among other things, removing or eliminating any competitors' advertising material in retail stores, without the prior consent of the retailer. The district court granted the motion on August 10, 2000. USTC moved for judgment as a matter of law, or for a new trial or reduction in damages, arguing that its conduct was not exclusionary, competition was not harmed and that Conwood had not established causation and damages. The district court denied the motion on August 10, 2000. On September 11, 2000, USTC filed this timely notice of appeal challenging the district court's (1) February 17, 2000 denial of its motion for summary judgment; (2) February 23, 2000 order denying its motion to exclude the damages study and testimony of Leftwich; (3) March 29, 2000 judgment on the jury verdict; (4) August 10, 2000 order denying its motion for judgment as a matter of law, or in the alternative for a new trial or reduction of damages; and (5) August 10, 2000 order granting Conwood's motion for permanent injunctive relief.

Facts

Both Conwood and USTC are manufacturers of moist snuff, a finely chopped smokeless tobacco that the user consumes by placing a small amount between the gum and cheek. The product is sold in small round cans, at a price of between $1.50 and $3. USTC produces the industry staples "Skoal" and "Copenhagen." Conwood's brands include "Kodiak" and "Cougar."

USTC's predecessor, Duke Trust, started the moist snuff industry in 1822, with its Copenhagen brand. In 1911, a judicial decree broke up the Duke Trust monopoly, which spawned three companies: American Snuff Company (Conwood's predecessor); USTC; and "Helme" (which is now known as Swisher International Group, hereinafter, "Swisher"). American Snuff Company changed its name to Conwood sometime during the 1950s. Conwood and Swisher were involved for many years in the "dry snuff" market. For sixty years, USTC was the sole manufacturer of moist snuff. Swisher and Conwood entered the moist snuff market in the late 1970s. The only other competitor in the moist snuff market is Swedish Match ("Swedish"). Thus, there are only four competitors in the moist snuff market in the United States.

After Conwood, Swisher, and Swedish entered the market, USTC's market share, which at one point was virtually 100 percent, declined. By 1990, the four manufacturers sold 28 different brands of moist snuff and USTC's market share was approximately 87 percent. During the 1990s, market growth accelerated in the moist snuff industry, and USTC's market share continued to drop. At trial, one of Conwood's expert witnesses, Morton Kamien, a professor at Northwestern University's Kellogg Graduate School of Business, testified that USTC currently controls 77 percent of the moist snuff market; Conwood controls approximately 13 ½ percent of the market and Swedish and Swisher comprise approximately 6 percent and 4 percent of the market, respectively.

In 1999, total moist snuff sales amounted to $1.68 billion. Also, in 1999, USTC earned approximately $813 million in revenues before taxes, interest and amortization. The company has the highest profit margin of any public company in the country. Kamien testified that because USTC is one of the most profitable companies in the country, and because of the amount of profit at stake in the moist snuff market, it "would

be a ripe opportunity for other firms to come in and try to get into the market . . . ." However, there have been no new entrants in the market since 1990. In addition, although USTC declined in market share about 1 percent per year between 1979 and 1999, Kamien testified that had there been true competition in the moist snuff industry, the decline would have gone much faster. He found it remarkable that while USTC's market share decreased, the company raised its prices. Testimony revealed that USTC had raised its prices approximately 8 to 10 percent per year between 1979 and 1998.

The Importance of In-store Advertising

Moist snuff is generally sold from racks. The racks have gravity fed slots or facings, from which consumers may select a can of the product. Each facing is filled with cans of a single brand of moist snuff. In addition to dispensing cans, the racks also provide "point of sale" ("POS") advertising, generally carried out by a "header card"—a cardboard sign attached to the front of the rack. The header card may contain such information as the name of the brand of moist snuff, any promotions running with the product, and a picture of the product.

The parties agree that POS in-store advertising is critical in the moist snuff industry because unlike with other products, such as soft drinks or snacks, tobacco advertising is restricted. Tobacco products cannot be advertised on TV or radio, and some places have restrictions on other forms of advertising outside of a retail store, such as on billboards. Further, the number of people who use smokeless tobacco products is relatively small in relation to those who consume other tobacco products. Thus, according to Harold Price, Swedish's vice president of sales and marketing, the point at which the buyer makes his purchase decision is the optimal time to convince the buyer to purchase a particular brand of moist snuff. Price testified that the "single most important" tool for

advertising is the merchandise rack, "because that's where we have the greatest opportunity and the last point to reach the consumer before [the consumer] makes [his or her] purchase decision."

Exclusive Racks, Category Management and CAP

Conwood showed at trial that beginning in 1990, USTC pursued strategies, emanating from high-level management, to exclude competition in the moist snuff market.

According to trial testimony, USTC had been able to convince "a number of major retailers" to allow it to have "exclusive racks" in their stores. An "exclusive rack" refers to one manufacturer supplying a rack to display its moist snuff products and those of all other manufacturers. Kroger's Steven Luckett testified that while his store permits each moist snuff company to have its own rack, an advantage of allowing only one rack to store all similar products is uniformity. It also allows retailers to stack products in a manner that looks more attractive and neat. According to Alan Hart, a former USTC salesman, less than 10 percent of stores carried USTC racks exclusively, and of those that did "most all of them" did so because the store authorized it. Several retailers testified that they requested exclusive racks. In fact, Mary Stevens, who managed a Kiwi store in Billings, Montana, testified that she used only a Conwood rack.[1]

During the 1990s, many retailers adopted the practice of category management. This practice varies from store to store, and involves managing product groups and business units and customizing them on a store-by-store basis to

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[1] USTC also points out that in 1996, Wal-Mart asked it and other moist snuff manufacturers to design a rack for the store to use for its moist snuff products. (J.A. at 492.) Conwood decided not to participate in the contest. *Id.* USTC's design won. *Id.* Swisher also won similar competitions for exclusive rack systems in K-Mart and Tom Thumb stores. (J.A. at 2859, 518-19, 1447-48.)

satisfy customer demands. The process can determine the quantity of items a store sells. For instance, it allows retailers, based on such data as sales volume, to determine which items should be allocated more shelf space. Manufacturers support the efforts of retailers by presenting to them products or a combination of products that are more profitable and "plan-o-grams" describing how, and which, products should be displayed. At Wal-Mart, Swedish and USTC were involved with category management, which entailed suggesting which items should be on the racks. Swisher at one point was also involved in the process.

As part of the category management process, retailers review plan-o-gram information provided by the manufacturer and compare the products they suggest be sold to the retailer's own independent analysis. The process is designed to ensure the best selling products are included in the plan-o-gram. Larry Luckett, who decides which moist snuff products will be sold at Kroger Company, testified that any supplier trying to use category management practices to control competition, in his store anyway, would be "committing suicide." USTC points out that no retailer testified that the company required shelf space allocations equal to its market share. Apparently, Wal-Mart rejected such a request from USTC.

However, according to Conwood, around 1990, USTC perceived it as a threat in the moist snuff market and took steps to eliminate it as a competitor and to "reject competition on the merits." USTC's president, Vincent Gierer, testified that around that time his company was losing market share and Conwood's volume was increasing. In the mid-1990s Conwood and Swedish introduced "price value" or half-priced brands of moist snuff. To show that USTC believed that such "price valued" products would erode its profits, Conwood points to a 1996 internal USTC report in which the company stated that one of its goals was to "[m]inimze the

growth in [price value] we have been experiencing over the past five years to the point where USTC can still grow the market and achieve desired growth for USTC." The report stated that USTC would "need to be more aggressive where [price value] has a higher share of the segment and will actively pursue strategies to limit the growth of the price value market segment."

Conwood also claims that USTC, in its role as category manager, deliberately provided false information to stores to exclude competitors from the market. For instance, David Waller, a wholesale distributor, testified that USTC has provided "skewed" national sales figures to retailers that do not always represent local product movement in stores. A report drafted by a division manager in Houston also shows that USTC sometimes provided false information to retailers to get them to maintain USTC's poor selling items while dropping competitors' products. Conwood employees also testified that USTC provided false information to retailers, such as by inflating actual sales data.

According to Conwood expert witness Robert Blattberg, an expert on category management and a professor of retailing at Northwestern's Kellogg Graduate Business School, many retailers consider moist snuff a small category and give it little attention. By "small," Blattberg explained that it is only consumed by about seven percent of the population, almost all male. However, it is a highly profitable item on a linear foot basis because it takes up so little space. He testified that no store, not even Wal-Mart, according to him the largest retailer in the world, has anyone solely devoted to the management of moist snuff. From reviewing USTC documents, he testified that USTC employees understood that retail category managers did not know as much as USTC did about pricing, product knowledge and profitability of the products. He stated that manufacturers often have access to data that retailers do not, such as Nielsen data, which tracks

product movement. He stated that because of their time constraints, retailers are most likely to delegate the task of category management with respect to such items as moist snuff. He testified that when a retailer does delegate category management responsibilities to a manufacturer, the latter has significant responsibility. The retailer will look to the manufacturer to provide such information as assortment recommendations for which items to stock, consumer information, sales, and which stores are stocking what items. He further testified that a retailer will rely on a large manufacturer to be its category captain because if a manufacturer controls 75 or 80 percent of the market many retailers will assume that the manufacturer will and can devote the resources to the category to help build it. For instance, Blattberg pointed to documents in which a USTC representative stated that "most retailers want the top dog running things because the dominant share of market customers will look to us for leadership."

Swedish's McClure also testified that "[t]here's only one category manager in the moist snuff business"—USTC. He also stated that while he would like to compete for the job of category manager, his company does not have shelf presence, consumer base or money. He also testified that USTC had not used its position fairly, had used its power "to keep [Swedish's] products off the shelf, and once it's there to get rid of it . . . ."

Terry Williams, Conwood's national sales manager, testified that in 1997 he was informed by one retailer that in order to obtain extra facings or a facing for a new item, the retailer first would have to consult with USTC. He also testified that before 1997, Conwood's market share in Wal-Mart was approximately 12 percent, but by the time of trial it was 6.5 percent. He explained that USTC's exclusive racks and its restrictions on Conwood's distribution began in Wal-Mart around 1997.

There is also documentary evidence that USTC sought to use its position as category manager to control and limit the number of price value products introduced in stores and to control the merchandising and POS placements in stores. In one 1997 report, a USTC regional vice president stated that "[i]t is imperative that we continue with this Category Management action plan to eliminate competitive products." In another document, a 1998 letter to David Untiedt, USTC national accounts director, a USTC employee stated that his biggest competitive concern with several stores in the Washington state area was the "availability of [Swedish's] Timberwolf [brand] and price differential between" that product and USTC's. The letter went on to state that "[a]lthough we control the merchandising and the POS placements, which will make the consumer awareness of the price differential difficult, some of the Circle K shoppers are always looking for a bargain." After reviewing this document, Blattberg testified that USTC apparently realized that customers were looking for a bargain, and that limiting the amount of POS and information makes it more difficult for the consumer to find price value brands. In yet another document Blattberg discussed, a USTC chain accounts manager in North Carolina wrote "Our objective with exclusive vending rights with this and other chains is to control expanded competitive distribution and competitive POS . . . we will continue to focus on merchandising rights to promote the growth of our product line and inhibit competitive growth . . . to the best of our ability." Blattberg testified that the obvious objective in having exclusive vending rights, according to the letter, is to reduce the amount of competitive items that can be offered.

According to Blattberg, documentary evidence showed that USTC intended to use its position as category captain to "control the number of price value product introductions." Blattberg testified that after reviewing numerous documents drafted by USTC staff, he saw instances where USTC

provided misleading information to retailers, including falsely reporting that some of their products were selling better than their competitors in an effort to thwart competition. He testified that by limiting the availability of the price value brands, USTC limits the choices for consumers. He also testified that it limits the ability of competitors to enter the market because it limits what the consumer can see. He stated that USTC's practices were inconsistent with the concept of category management.

Kamien also testified that USTC's conduct harmed consumers by limiting variety and raising prices. He produced a chart showing that for every 10 percent increase in USTC facings, retail prices for moist snuff rose by $.07. A Wal-Mart manager testified that after USTC eliminated competitors' POS and facings, the number of other moist snuff items available to the store's customers declined.

Conwood introduced numerous documents drafted over several years by various USTC personnel, including chain accounts managers and others, that indicate USTC may have used its exclusive vending rights to hurt competition. *See e.g.*, J.A. at 2182 ("objective with exclusive vending rights with this and other chains is to control expanded competitive distribution and competitive P.O.S. Department . . . . We will continue to focus on merchandising rights to . . . inhibit competitive growth (to the best of our ability));" J.A. at 2185 ("We stressed in our Department Meeting the importance of cutting competitive distribution. In many stores, especially supermarkets, distribution of competitive brands is much too high . . . ."); J.A. at 2375 ("Even though Conwood does not like the fact that we sometimes house their product in our vending, I have encountered more and more retailers that are surprised when I include the comp[etitions'] products. I feel it is better for them to be lost in our vending th[a]n to have their own and no point of sale on the vendor."); J.A. at 2401 ("Our objective is to control the smokeless home, . . . provide

facings for competitive, control facings and positioning, and make our presence larger via P.O.S."); J.A. at 2523 ("With arrogance and grace, I have taken a personal vendetta against the Conwood Reps. in my areas. I am devoting an extra effort toward eliminating as many laggard Conwood brands at retail as possible . . . Since I am offering a cash counter payment for exclusive UST vending on our 2908 displays, I am giving Kodiak . . . [a Conwood brand] one facing . . . .").

In 1998, USTC introduced its Consumer Alliance Program ("CAP"), which entails granting retailers a maximum discount of .3% for providing USTC with sales data, and participating in USTC promotion programs, and/or giving the best placement to USTC racks and POS. According to Conwood, however, CAP is another means by which USTC excludes competition. For example, in "a monthly competitive letter" dated March 27, 1998, a USTC employee stated that the CAP "has become a great incentive in securing space for our vendors and for the elimination of competition products."

There was testimony that the CAP can be used to exclude competitive POS advertising, and that USTC was extremely successful in signing up retailers to enter into these agreements. In the first couple of months of the program, USTC was able to sign 37,000 retailers to the CAP, which represents 80 percent of its overall volume in moist snuff sales.

Unauthorized Removal of Conwood Racks

According to Conwood, when USTC sales representatives restocked or rearranged their own displays, they would routinely discard hundreds of thousands of Conwood racks and their accompanying POS. William Rosson, Conwood's Chairman, testified that after 1990, Conwood spent $100,000 a month on replacement racks. Rosson testified that the company had "monumental problems" keeping their moist snuff on the shelf. A Conwood sales representative testified

that when displays were removed, Conwood was successful in restoring them about 95 percent of the time. Rosson testified that about 50 percent of sales representative's staff time was spent repairing racks destroyed by USTC representatives. Because two to three months would sometimes pass before a sales representative could return to the same store, Conwood lost sales even when it was able to restore racks.

Conwood also asserts that USTC would remove its POS and racks under the guise that retailers had given it permission to do so. Conwood argues that any permission to remove its products was done under a ruse of organizing or straightening stores. It argues that USTC supervisors trained their staff to take advantage of inattentive store clerks, apparently so that they could destroy Conwood's racks and headers in retail stores. For instance, Shawn Ulizio, a former USTC employee testified that most clerks did not understand or care that there were different manufacturers of snuff products. Another former USTC sales representative testified that after he got permission from a store manager, he would remove Conwood racks and put Conwood's products in USTC racks. Former USTC representative Lawrence Borrowdale testified that he was instructed, apparently by his supervisor, that if a competitor's rack was in the way, he should remove it. Borrowdale testified that on occasion he would remove competitors' racks and bag up their fresh products and place them under a counter. Several other former USTC employees gave similar testimony. Kamien testified that the documentary evidence showed that the problem of USTC removing competitors' racks was widespread over a period of time.

One Conwood employee testified that except for moist snuff, he never encountered problems with his displays regarding any Conwood product. He testified that he would place moist snuff racks in stores only to return later to have

the displays gone and any remaining Conwood brands stuffed in USTC's rack. Another Conwood employee gave similar testimony. He also stated that once the USTC representative in his area told him that he intended to "bury" him. Later, he witnessed that same representative breaking down his rack one day, while USTC's regional vice president, then a USTC department manager, observed. Conwood did not encounter this problem with its displays of smokeless tobacco products in markets in which USTC did not compete.

Gayleen Rusk, who manages an Amoco Pronto Express, testified that she had experienced a USTC sales representative removing Conwood's racks and putting the products in the USTC rack. She testified that when she first started working at the store and did not know any better, she would allow it. Upon learning that the USTC representative was not supposed to bother competitors' racks, she would tell him not to do so when he visited the store. She stated that he would then come when she was not on duty and remove Conwood's rack anyway. Regarding the effect of not having Conwood brands in her store, Amoco manager Rusk stated that when customers request the items, they do not have them to sell. According to Conwood representative Brett Jeffery, when he told the USTC representative to stop removing his racks, Conwood's sales "dramatically increased." One former USTC representative, who witnessed the removal and destruction of Conwood's POS and racks stated that it had an effect on sales. According to him, no exposure meant no sale. Three other store witnesses also testified that they had seen or experienced USTC representatives removing Conwood racks.

According to USTC, however, retailers rely on manufacturers and wholesaler representatives to perform certain merchandising tasks for them, such as cleaning and rearranging items where a retailer may require more space to add or expand a section. USTC claims that during the 1990s, its more than 600 sales personnel visited 8 to 10 retail stores per

day, totaling more than 7 million sales calls. These visits may involve, among other things, removing a competitor's products, racks, or POS, but only at the retailer's direction. USTC also points out that three of the former USTC employees that said that they removed Conwood racks and/or displays at the direction of their supervisors testified that they did so with the retailer's permission. Further, one had not worked for USTC since 1987, before the challenged conduct began. USTC concedes, however, that four witnesses testified that they removed racks and POS materials without retailer authorization. Further, Conwood sales representatives testified that their USTC counterparts told them they had orders from their supervisors to eliminate Conwood racks or facings, and in some cases, their compensation or bonuses depended on such rack destruction.

Damages

Rosson testified that had Conwood not been subjected to USTC tactics, it would have had a national market share of approximately 22 to 23 percent. Rosson testified that he had carefully tracked Conwood's market share over the past 20 years. Conwood's actual market share in its first 10 years in the moist snuff industry was 11 percent. In the next decade, starting from 1990, that figure increased by roughly 2.5 percent. Rosson testified that the lack of growth that occurred during the second decade largely resulted from USTC's tactics. He testified that his numbers are based on his studying markets where the company had a foothold and those in which it did not. In places where the company had a "foothold," i.e., a relatively high market share in a given area, it saw its market share increase during the 1990s to a market share above 20 percent. Rosson testified that each additional point (one percent) of market share translates into approximately $10 million in annual profits.

Williams testified concerning Conwood's market share with respect to the ten retail locations for which USTC offered evidence at trial. In those locations where USTC did not have rack exclusivity, Conwood's moist brands market share was well above its national average. For those locations where USTC had rack exclusivity, Conwood's market share was below its national average. Conwood argues that from these figures, a jury could have concluded that in unimpeded competition, Conwood's market share would have been approximately 25 percent instead of 13.5 percent nationally.

Finally, to prove damages, Conwood relied on the expert testimony of Professor Richard Leftwich of the University of Chicago Graduate School of Business, who is recognized as an expert on business valuation and lost profits. Leftwich apparently tested Rosson's hypothesis that Conwood's market share increased in areas in which it did not face USTC exclusivity.

Using a regression analysis, Leftwich found a statistically significant difference between states in which Conwood had a foothold and those in which it did not. Under Leftwich's model, in states where Conwood had a market share in 1990 of 20 percent or more, the market share grew on average an additional 8.1 percent from 1990 to 1997. In states where Conwood's market share in 1990 was at least 15 percent, it grew an additional 6.5 percent. In states below these thresholds, Conwood's growth was considerably lower. As the district court noted:-

> Leftwich applied a regression analysis to test Conwood's hypotheses. He determined that Conwood's share in a state in 1990 is statistically related to the change in Conwood's market share between 1990 and 1997. The regression model predicts that where Conwood had a higher market share (e.g. 15-20%) in 1990, Conwood's market share grew during the period 1990 to 1997. In

> contrast, in states where Conwood had a lower market share, the regression predicts that its share would grow very little.

(J.A. at 87-88.)

Leftwich then determined that Conwood's low market growth was due to USTC's behavior. Leftwich's model also found that increases in USTC's exclusionary behavior in a state reduced Conwood's share of sales by a statistically significant amount. He found that Conwood's damages as a result of USTC's actions amounted to a figure between $313 million and $488 million, depending on whether Conwood's market share would have grown by 6.5 percent or 8.1 percent. The jury awarded damages of $350 million.

DISCUSSION

I.

This Court reviews a district court's denial of a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) *de novo*. *Williams v. Nashville Network*, 132 F.3d 1123, 1130 (6th Cir. 1997) (citing *K & T Enterprises, Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir.1996)). "In a federal question case, the standard of review for a Rule 50 motion based on sufficiency of the evidence is identical to that used by the district court. The evidence should not be weighed, and the credibility of the witnesses should not be questioned." *Williams*, 132 F.3d at 1130-31. Further, the evidence is viewed in the light most favorable to the non-movant, and all reasonable inferences are drawn in that party's favor. *Id.* at 1131. This Court should grant the motion only if "reasonable minds could not come to a conclusion other than one favoring the movant." *Id.* Our task also embodies assuring that the district court "indulge[d] all presumptions in favor of the validity of the jury's verdict," and "refrain[ed] from inter-

fering with [the] jury's verdict unless it [was] clear that the jury reached a seriously erroneous result." *Id.* (citing *Brooks v. Toyotomi Co.*, 86 F.3d 582, 588 (6th Cir.1996)).

This court considers the district court's decision to admit or exclude expert testimony for abuse of discretion, recognizing, of course, that such review calls for deference to the district court's decision. *See Clay v. Ford Motor Co.*, 215 F.3d 663, 666 (6th Cir. 2000) (citing *General Elec. Co. v. Joiner*, 522 U.S. 136, 138-139, 143 (1997)). Thus, we will reverse a district court only where we are left with a definite and firm conviction that it committed a clear error of judgment. *Singleton v. United States*, 277 F.3d 864, 870 (2002) (citing *Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 716 (6th Cir.1999)).

II.

USTC argues that the evidence presented at trial amounted to no more than "insignificant" tortious behavior and acts of ordinary marketing services. It contends that tortious activity cannot form the basis for liability under the Sherman Act unless "that activity is pervasive and accompanied by other anti-competitive conduct." USTC also argues that Conwood failed to show that it was foreclosed from the market, was unable to compete for shelf space, that competition among moist snuff suppliers was injured, or, generally, that any harm alleged was caused by anything other than competition itself. It contends that its category management services and promotional programs are common marketing practices. These services, among other things, (1) enhance demand for USTC's products and help to ensure that retailers use shelf space efficiently, (2) build consumer loyalty, and (3) improve presentation of the products. USTC states that trial testimony showed that, during the relevant period, retailers retained control of shelf space allocation, and which racks and POS materials were used. Further, during the relevant period

(1990-1998), it argues that market output increased, its competitors' market shares doubled, and Conwood's sales and profits grew.

Conwood argues that the evidence in this case was sufficient to support the jury's verdict. Conwood contends that the jury heard and rejected USTC's argument that its conduct was ordinary "demand enhancing" business behavior. It argues that the evidence showed an "orchestrated USTC campaign to eliminate rival distribution and promotion with no competitive justification." Conwood argues that while USTC points to increased sales in the moist snuff market, it ignores the fact that in the "but for world of unimpeded competition, consumers and Conwood would have done substantially better." We agree with Conwood, and despite USTC's arguments in support of its position, we believe there was sufficient evidence to support the jury's verdict.

III.

A claim under § 2 of the Sherman Act requires proof of two elements: (1) the possession of monopoly power in a relevant market; and (2) the willful acquisition, maintenance, or use of that power by anti-competitive or exclusionary means as opposed to "growth or development resulting from a superior product, business acumen, or historic accident." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 595-96 (1985); *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). "To establish the offense of monopolization a plaintiff must demonstrate that a defendant either unfairly attained or maintained monopoly power." *Potters Med. Ctr. v. City Hosp. Ass'n*, 800 F.2d 568, 574 (6th Cir. 1986) (citation omitted); *Beverage Mgmt., Inc. v. Coca-Cola Bottling Corp.*, 653 F.Supp. 1144, 1151 (S.D. Ohio 1986). "Monopoly power consists of 'the power to control prices or exclude competition.'" *Potters*, 800

F.2d at 574 (citing *Grinnell*, 384 U.S. at 571). "An attempted monopolization [under § 2] occurs when a competitor, with a dangerous probability of success, engages in anti-competitive practices the specific design of which are, to build a monopoly or exclude or destroy competition." *Smith v. N. Michigan Hosps., Inc.*, 703 F.2d 942, 954 (6th Cir. 1983) (citations and internal quotation marks omitted). In a § 2 case, "only a thorough analysis of each fact situation will reveal whether the monopolist's conduct is unreasonably anti-competitive and thus unlawful." *Byars v. Bluff City News Co.*, 609 F.2d 843, 860 (6th Cir. 1979) (citations omitted); *see also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 467 (1992) ("This Court has preferred to resolve anti-trust claims on a case-by-case basis, focusing on the particular facts disclosed by the record.") (citations and internal quotation marks omitted). Moreover, in order for a "completed" monopolization claim to succeed, the plaintiff must prove a general intent on the part of the monopolist to exclude; while by contrast, to prevail on a "mere"attempt claim, the plaintiff must prove a specific intent to "destroy competition or build a monopoly." *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 101 (2d Cir. 1998). However, "no monopolist monopolizes unconscious of what he is doing." *Aspen*, 472 U.S. at 602. Thus, "[i]mproper exclusion (exclusion not the result of superior efficiency) is always deliberately intended." *Id.* at 603 (citation omitted).

The first step in any action brought under § 2 of the Sherman Act is for the plaintiff to define the relevant product and geographic markets in which it competes with the alleged monopolizer, and with respect to the monopolization claim, to show that the defendant, in fact, possesses monopoly power. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 268-69 (2d Cir. 1979). "A geographic market is defined as an area of effective competition." *Re/Max*, 173 F.3d at 1016 (citation omitted). "[I]t is the locale in which consumers of a product or service can turn for alternative sources of supply." *Id.*

In the instant case, USTC does not challenge that it has monopoly power; nor is there an issue as to the relevant product (moist snuff) and geographic markets (nationwide).[2] On appeal, USTC contends that Conwood has failed to establish whether USTC's power was acquired or maintained by exclusionary practices as opposed to its legitimate business practices, and a superior product. *Aspen*, 472 U.S. at 595-97. In determining whether conduct may be characterized as exclusionary, "it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Aspen*, 472 U.S. at 605. "If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory [or exclusionary.]" *Id.* However, merely because an entity has monopoly power, does not bar it from taking

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[2] Whether a company has monopoly or market power "may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market." *Tops Market*, 142 F.3d at 97-98 (citation omitted); *see also Re/Max*, 173 F.3d at 1016 (citation omitted). "[T]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition is excluded, but that power exists to raise prices or to exclude competition when it is desired to do so." *Byars*, 609 F.2d 843, 850 (citations omitted). Courts have increasingly leaned toward using circumstantial evidence as a shortcut to determine whether monopoly power exists. *Re/Max*, 173 F.3d at 1016. Such circumstantial evidence may encompass a high market share within a defined market. *Id.* at 1018. At trial there was evidence that USTC enjoyed 74 to 77 percent market power nationwide in the moist snuff industry. As previously stated, USTC neither challenges this finding nor argues that it does not possess monopoly power. To that end, we agree with USTC that the monopolization and attempt to monopolize claims are coterminous inasmuch as USTC concedes monopoly power. *See Northeastern Tel. Co. v. American Tel. and Tel. Co.*, 651 F.2d 76, 85 (2d Cir. 1981) (explaining that where *ability* to exclude entry and control prices is present, the two offenses are coterminous).

advantage of its scale of economies because of its size. *Id.* at 597. Such advantages "are a consequence of size and not the exercise of monopoly power." *Id.*

USTC contends that none of the practices Conwood complains of amount to antitrust violations, but are no more than isolated sporadic torts. We disagree. Conwood presented evidence that beginning in 1990 USTC began a systematic effort to exclude competition from the moist snuff market. Conwood presented sufficient evidence that USTC sought to achieve its goals of excluding competition and competitors' products by numerous avenues. Conwood principally complains that USTC (1) removed racks from stores without the permission of store management and discarded and/or destroyed these racks, while placing Conwood products in USTC racks in an effort to bury Conwood's products and reduce their facings; (2) trained their "operatives to take advantage of inattentive store clerks with various 'ruses' such as obtaining nominal permission to reorganize or neaten the moist snuff section," in an effort to destroy Conwood racks; (3) misused its position as category manager by providing misleading information to retailers in an effort to dupe retailers into believing, among other things, that USTC products were better selling so that retailers would carry USTC products and discontinue carrying Conwood products; and (4) entered into exclusive agreements with retailers in an effort to exclude rivals' products.

Isolated tortious activity alone does not constitute exclusionary conduct for purposes of a § 2 violation, absent a significant and more than a temporary effect on competition, and not merely on a competitor or customer. *See* 3A Areeda & Turner, Antitrust Law, ¶ 782(a), at 272 (2002). Business torts will be violative of § 2 only in "rare gross cases." *Id.* As USTC recognizes, however, this is not to say that tortious conduct may never violate the antitrust laws. *See e.g., Byars*, 609 F.2d at 854 n.30 (holding that acts by defendant, a

wholesale periodical distributor, against a smaller company attempting to compete against it, may be deemed exclusionary, including removing plaintiff's periodicals from sales racks at various retail outlets, covering up plaintiff's periodicals on racks so that prospective buyers could not see them, and disparaging plaintiff, his financial condition and the magazine's financial condition); 3A Areeda & Turner, *supra*, ¶ 782(a) at 272. Moreover, merely because a particular practice might be actionable under tort law does not preclude an action under the antitrust laws as well. *Id.* at 271. "'Anti-competitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." *Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998) (reversing district court's dismissal of complaint and holding that radio station owner stated § 2 Sherman Act claim where defendants' anti-competitive conduct consisted of making misrepresentations to advertisers and the government in order to protect their monopoly).

USTC contends that the rack and POS removal activity was isolated and sporadic. It contends that the record identifies a *de minimis* number of improper incidents. USTC points out that it has 600 sales personnel which made approximately 8 to 9 million sales calls during the 1990s. It argues that the district court "disregarded the fact that conduct and circumstances "differed greatly from chain to chain and store to store." *See In re Airport Car Rental Antitrust Lit.*, 474 F.Supp. 1072 (N.D. Cal. 1979) (holding that rental car company would be required to prove damages on airport by airport basis for each airport for which plaintiff sought damages by reason of its exclusion).

In the instant case, the district court rejected USTC's argument, essentially describing it as impractical. At issue in this case are 300,000 separate retail establishments across the country. We believe the district court correctly determined

that to have required the parties to investigate activity at specific retail establishments would have been so costly as to have effectively ended this suit, despite substantial evidence of anti-competitive activity. In addition, "in an action for damages for violation of the antitrust laws plaintiff is [not] limited to recover only for specific items of damage which he can prove with reasonable certainty. On the contrary, the trier of the facts may make a just and reasonable estimate . . . based on relevant data and may act upon probable and inferential . . . proof." *Elyria-Lorain Broad. Co. v. Lorain Journal Co.*, 358 F.2d 790, 793 (6th Cir. 1966) (citation omitted).

It is undisputed that POS advertising and a manufacturer's ability to sell its moist snuff from its own racks are critical to success in the moist snuff market. *See Byers*, 609 F.2d at 860 (explaining that only a case-by-case analysis of each fact situation will determine whether the monopolist's conduct is anti-competitive). Because of restrictions on advertising in the tobacco industry, and the critical nature of POS advertising in the relevant market, efforts by USTC, a conceded monopolist, to exclude Conwood's racks and POS advertising from retail locations through any means other than legitimate competition could certainly support Conwood's § 2 Sherman Act claim. *See Aspen*, 472 U.S. at 605. Conwood presented evidence that USTC sales representatives continuously removed and discarded Conwood POS and racks after 1990 without store authorization. While the number of witnesses who actually testified was limited, the acts testified to were widespread. Douglas Hyaneck, a Conwood district manager, testified that when he served as a sales representative, he had trouble with rack removals in his stores in the northern Michigan area. He also stated that from the time he became a district manager until 1998, 40 to 50 percent of his sales staff's time was spent replacing racks. Gary Ryan, another Conwood sales representative in the Sikeston, Missouri area, says that about 1,200 of his racks were removed. He stated

that the problem continued even after a new USTC sales representative was hired in his area. Both men testified that their racks were removed by USTC sales representatives. John Falevsky, a Conwood sales representative in the Milwaukee, Wisconsin and Southeastern Wisconsin area, and Sales Representative Jeffrey Dring also testified about rampant incidents of rack removal by USTC representatives in their areas. Falevsky testified that he once approached his USTC counterpart about the matter and was told that the latter's bonus depended on how many Conwood racks he could get out of the stores. There is no indication that any of these acts were authorized by the stores at which they occurred. Morever, Rosson, Conwood's Chairman, testified that he would receive estimates that as much as 50 percent of his employees' time was being spent on repairing damaged or discarded racks. He stated that some months, beginning in 1990, Conwood was spending as much as $100,000 a month to replace racks, which constituted as many as 20,000 racks a month being replaced. USTC did not challenge any of this evidence at trial. Construing the evidence in the light most favorable to Conwood, these incidents were neither sporadic nor isolated. *Cf. Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 931 (4th Cir. 1990) (holding that "'sporadic activity' identified by the plaintiffs does not amount to an antitrust violation").

In terms of retailer testimony, Gayleen Rusk, who manages an Amoco Pronto Express, testified that she had experienced a USTC sales representative removing Conwood's racks and putting its products in the USTC rack. She testified that she allowed it to happen when she first started working at the store because she did not know any better. Upon learning that the USTC representative was not supposed to bother competitors' racks, she would tell him not to do so when he visited the store. She stated that he would then come when

she was not on duty and remove Conwood's rack. Three other store witnesses also testified that they had seen or experienced USTC representatives removing Conwood racks.

Conwood also alleged that USTC used its role as category captain and/or manager to exclude competition. USTC points out that retailers testified that they alone, not USTC, determined and controlled what racks and POS were used in their stores. Conwood's Rosson admitted that he could not name one store that gives final decision-making power over its snuff section to his company's competitors. Other retailers verified this assertion. Kroger's Luckett testified that USTC did not receive all the facings in the plan-o-grams that it requested and that Kroger's retains ultimate authority about product placement. Retailer Paul McGuire also testified that he welcomed input from suppliers but retained final authority about product placement.

However, there was other evidence, which USTC ignores, that USTC used its position as category manager to exclude competition by suggesting that retailers carry fewer products, particularly competitor's products; by attempting to control the number of price value brands introduced in stores; and by suggesting that stores carry its slower moving products instead of better selling competitor products. Much of the evidence Conwood highlights was documentary, interpreted by experts. However, that evidence is nevertheless probative of USTC's intent to exclude competition.[3]

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[3] USTC complains that Conwood was allowed to rely on numerous hearsay documents that detailed conduct that is routinely rejected as not being very probative of anti-competitive intent and that showed nothing more than statements about competitive objectives. However, experts are entitled to rely on documents, even hearsay documents that are otherwise inadmissible. *Kingsley Associates, Inc. v. Del-Met, Inc.*, 918 F.2d 1277, 1286-87 (6th Cir. 1990) (holding that Federal Rules allow experts to base their opinions on hearsay and other evidence otherwise inadmissible at trial).

In one such instance, Blattberg opined that an e-mail sent by a USTC regional vice president and USTC director of national accounts showed that the company abused its position of category manager. The e-mail stated that USTC believed it could continue to be the category captain in certain stores in the Texas area, and "we may be able to control the number of price value product introductions and their pursuit of a private label brand." (J.A. at 1610.) Blattberg testified that the significance of this document is that it shows that USTC planned to control competition. It shows USTC intended to control the number of price value brands and other products, which he stated meant that if USTC could convince retailers not to stock those items, the result would be to prevent rapidly growing or lower priced items from entering the marketplace. He testified that this is not consistent with the concept of category management, which is based on trust.

As for other abuses, Blattberg noted that the 1997 weekly activity report from a USTC division manager in Houston to a department manager stated that the company was receiving pressure from retailers to drop "Flavor Packs" in accounts where USTC was discontinuing competitive brands due to slow movement. (J.A. at 2559.) The report states:

> Last week at Fiesta Supermarkets, I was able to get them to drop all competitive brands (12 total) and keep only Redwood and Kodiak. The buyer argued with me that we should be dropping Flavor Packs too because FP are selling less than most of the products we discontinued despite our counter displays. We were able to maintain our counter display and the product, but he makes a very valid point that we are not being total [sic] honest with our partners when we sell them on share for space concept if we don't include our poor selling brands in the mix. I am afraid that we are using up our partnerships and good will when we talk about partnerships and sell

> our concept only to turn right around and ask them to go against what we just convinced them was in their best interest just to keep Flavor Packs in account.

Id. Blattberg testified that this document shows that USTC tried to gerrymander the data to this retailer. (J.A. at 1614.) Again, he opined that such practices violate the trust central to a category management relationship. Further, such evidence counters USTC's argument that only retailers controlled facing decisions.

Conwood does not appear to challenge USTC's role as category manager *per se*, but rather the manner in which it used its position as a monopolist providing category management services, i.e., to exclude it from competition. *See Aspen*, 472 U.S. at 605 (explaining that excluding rivals on a basis other than efficiency may be characterized as predatory or anti-competitive); *see also Eastman Kodak*, 504 U.S. at 483 (holding that under the willful-maintenance-of-monopoly power prong, defendant's liability in § 2 Sherman Antitrust claim turned on whether defendant could present a "valid business reason[] for its exclusionary conduct").[4] As

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[4] To the extent that USTC complains that evidence of its unlawful anticompetitive conduct, and its lawful conduct to take advantage of scale of economies, offer category management services or engage in other promotional activity in general were commingled, the district court properly instructed the jury that USTC could not be held liable for conduct that was part of the normal competitive process. The jury is deemed to have followed these instructions. *Aspen*, 472 U.S. at 604-05. In addition to that argument, USTC also contends that Conwood has failed to show that its practices foreclosed competition. It further contends that its exclusive dealing arrangements with retailers cannot be invalid, absent a "particularized showing of unreasonableness." *See. e.g., Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1080 (1st Cir. 1993) (explaining that a complaint that alleges, *inter alia*, no more than exclusive dealing arrangements may be susceptible to dismissal for failure to state a claim). However, Conwood's claim is broader than merely challenging the exclusive agreements USTC entered into with retailers for exclusive racks. As explained in the text of this opinion, among other things,

explained above, Conwood presented evidence that the category management program was used to place USTC racks exclusively in retail stores and hide competitor products in its racks. *See e.g.*, J.A. at 2375 ("Even though Conwood does not like the fact that we sometimes house their product in our vending, I have encountered more and more retailers that are surprised when I include the competition's products. I feel it is better for them to be lost in our vending then to have their own and no point of sale on the vendor.").

USTC's chairman Gierer testified that if his company's "goal . . . was to go into a store and reduce . . . competitive facings, then that shouldn't have happened. That's not a legitimate goal." Yet, Gierer later admitted that his company had endorsed a "strategy of eliminating competitive distribution." (J.A. at 2024.) Despite USTC's claims that its actions amounted to no more than competition and that "everybody does it," Gierer admitted that he was embarrassed by some of the testimony presented at trial, especially the testimony of Mr. Untiedt, USTC's director of national accounts, who apparently could not answer whether it was appropriate to mislead retailers. Gierer further testified that as a result of the evidence presented at trial, he was going to conduct an investigation into his company's practices. Gierer essentially admitted that the activities about which Conwood

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Conwood presented evidence that USTC pervasively destroyed Conwood's racks, and used its monopoly power to misrepresent sales activity of moist snuff products for purposes of obtaining exclusive racks and to bury competitors' products therein, all of which affected competition in the moist snuff market. Moreover, Conwood's claims are distinguishable from those asserted in several of the cases USTC cites, wherein plaintiffs alleged that exclusive arrangements violated § 3 of the Clayton Act, 15 U.S.C. § 14 or other sections of the antitrust statutes. *See e.g., Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) (holding that "[o]nly those arrangements whose 'probable' effect is to 'foreclose competition in a substantial share of the line of commerce affected' violate Section 3").

complains, particularly the misrepresentations to retailers to obtain exclusive vending, was not competitive conduct spurred by efficiency. Moreover, USTC has failed to offer any valid business reason for its representatives' pervasive destruction of Conwood racks. Instead, it merely has chosen to argue that such destruction can never form the basis for an antitrust claim.

The evidence Conwood presented in this case regarding USTC's exclusionary conduct must be considered in the context of Conwood's theory. *See Caribbean Broad. Sys.*,148 F.3d at 1087. The theory Conwood advanced at trial is that USTC engaged in a concerted effort, directed from the highest levels of a national monopoly, to shut Conwood out from effective competition through the elimination of its racks and POS advertising, all in the unusual moist snuff market, where POS is the central marketplace battleground. *See e.g., R.J. Reynolds Tobacco Co. v. Phillip Morris Inc.*, 60 F. Supp. 2d 502 (M.D.N.C. 1999) (granting preliminary injunction barring cigarette manufacturer in § 2 action from implementing program with retailers that would allow its product to hold most visible position in sales racks; and noting that in cigarette market product visibility and advertising at the point of purchase are essential to remaining competitive). There was ample documentary and testimonial evidence supporting this theory. The jury could have found, and apparently did find, that USTC's pervasive practice of destroying Conwood's racks and POS materials and reducing the number of Conwood facings through exclusive agreements with and misrepresentations to retailers was exclusionary conduct without a sufficient justification, and that USTC maintained its monopoly power by engaging in such conduct. Therefore, the district court did not err in holding that there was sufficient evidence for a jury to find willful maintenance of monopoly power.

IV.

USTC argues that Conwood has failed to show that it or competition was harmed in the national moist snuff sales market. It argues that there was no injury to competition because the number of moist snuff brands actually increased during the 1990s, including the price-value products. It also argues that no injury to competition in the moist snuff market is shown because during the same period, other tobacco products decreased. USTC argues that where the market has actually expanded, there can be no showing of injury to competition. Further, USTC argues that Conwood has failed to show injury. It argues that during the relevant period, Conwood's market share actually increased. It also argues that there were other factors in the market, such as retailers' choices not to display Conwood's racks and POS, that caused Conwood's injury.

Conwood counters that it produced expert testimony showing that USTC's exclusion of rivals' POS racks and facings caused an increase in prices, reduced sales and limited choice. It also claims that but for USTC's actions, the market would have grown more. Finally, it argues that the fact that its own profits increased during the relevant period is not dispositive of the issue of injury.

The antitrust laws are intended to protect competition, not competitors. *See Andrx Pharmaceuticals, Inc. v. Biovail Corp. Intern.*, 256 F.3d 799, 812 (D.C. Cir. 2001) (citation omitted); *Tennessean Truckstop, Inc. v. NTS, Inc.*, 875 F.2d 86, 88 (6th Cir. 1989) (citations and internal quotation marks omitted). To prevail, a "[p]laintiff[] must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Valley Prods. Co., Inc. v. Landmark, A Division of Hospitality Franchise Sys., Inc.*, 128 F.3d 398, 402 (6th Cir. 1997) (citation omitted). Specifically, to recover damages, an "antitrust plaintiff must

show (1) that the alleged violation tends to reduce competition in some market and (2) that the plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the defendant's actions." *Id.* An antitrust plaintiff bears the burden of showing that the alleged violation was a material cause of its injury, a substantial factor in the occurrence of damage or that the violation was the proximate cause of the damage. *See Ezzo's Inv., Inc. v. Royal Beauty Supply, Inc.*, 243 F.3d 980, 990 (6th Cir. 2001). As this Court stated,

> [a]lthough a plaintiff need not show that the defendant's wrongful actions were the sole proximate cause of his injuries, the causal link must be provided as a matter of fact and with a fair degree of certainty. To be one of several causes is not enough. The evidence linking the violation to the injury must be more precise than that needed to establish the amount of damages.

Id.

USTC first argues that Conwood failed to show harm to competition in the market because output increased and new products were introduced into the market. There was evidence at trial that total market output increased in the moist snuff industry during the relevant period. Between 1990 and 1999, overall sales volume of moist snuff increased 16 million pounds. Also, during this period, new products entered the market, and by 1999, there were 40 brands of moist snuff, 24 of which came from USTC competitors. (J.A. at 474-76.) In *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997), the Ninth Circuit held that antitrust plaintiffs had failed to produce "credible evidence to support their contention" that the defendant's actions had "deterred entry into this market," because during the relevant period industry output in the relevant market had substantially expanded. *Id.* at 1164; *see also Campus Ctr. Discount Den, Inc. v. Miami Univ.*, No. 96-4002, 1997 WL 271742, at *2

(6th Cir. May 21, 1997) (holding that convenience store plaintiff failed to state a claim under the antitrust laws because it failed to show that any alleged anti-competitive conduct on behalf of the defendant reduced overall demand for convenience store market).

Conwood, however, argues that the issue is whether the market would have grown more absent USTC's antitrust violation. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the evidence showed that following the defendant's alleged predation, output in the relevant market and market shares for others grew. *Id.* at 233-34. The Court stated, however, that the fact that the defendant's entry in the market did not restrict output was not dispositive. *Id.* at 234. "One could speculate . . . that the rate of growth would have tripled, instead of doubled [absent the] alleged predation." *Id.* at 234. However, the Court stated that there was no evidence that this was so. *Id.*

In the instant case, Kamien, Conwood's expert, testified that as a result of USTC's exclusionary conduct, the consumer suffered by having to pay higher prices, and that there was less variety in the market. (J.A. at 525.) The district court noted that much of the evidence regarding injury to competition was based, in part, on Kamien's testimony, which the jury obviously believed. Thus, although output in the moist snuff market grew, there was evidence showing that USTC's actions caused higher prices and reduced consumer choice, both of which are harmful to competition. *See Brooke Group*, 509 U.S. at 234. Conwood's market share did grow slightly between 1990 and 1998; however, growth during that period, which was about 2.5 percent, stands in stark contrast to the growth in market share of approximately 11 percent that Conwood experienced in the ten years prior to 1990. In addition, Swedish's chairman also testified that USTC's activity restricted its growth. He testified that USTC used its power "to keep [Swedish's] products off the shelf, and once

it's there to get rid of it . . . ." Thus, there was sufficient evidence that during the relevant period, the growth of two of the three other manufacturers of moist snuff aside from USTC slowed, and that the restricted growth resulted from USTC's conduct. In addition, Kamien testified that since 1990, no new firm had entered the moist snuff market, which he found odd because of the high amount of potential profit at stake in that market and the fact that USTC was the most profitable company in the country. He further testified that had there been true competition in the moist snuff market, USTC's market share, which dropped approximately 1 percent per year between 1979 and 1990, would have fallen much faster. We believe that construing the evidence in the light most favorable to Conwood, as we must, it was sufficient to show that competition suffered during the relevant period. *Williams*, 132 F.3d at 1131.

USTC also argues that its conduct was not the "necessary predicate" of any injury Conwood suffered, and thus Conwood cannot recover under the antitrust laws. USTC argues that any injury Conwood suffered was the result of retailers' decisions to enter into contracts with it and others to serve as category managers. For support, USTC primarily relies on *Valley Products*, 128 F.3d 398. In that case, a plaintiff who made and sold soap for use in hotels and motels under franchises granted by defendants brought suit under the Clayton Act, 15 U.S.C. § 15, when plaintiff was denied permission to continue using on its items logos owned by the defendants. *Id.* at 400-01. The defendants had ended their agreement with plaintiff after it granted two other manufacturers "preferred supplier status," which meant they alone could place the trademarks owned by one of the defendants on their amenities. *Id.* This Court affirmed the district court, which found that the plaintiff had not shown an antitrust injury. *Id.* at 400. This Court noted that to show antitrust injury, the plaintiff must show more than economic injury. *Id.* at 402. The Court stated that an analysis of the "the directness

or indirectness of the injury was appropriate." *Id.* at 403. The Court noted that an injury does not exist for purposes of antitrust suits if it does not flow directly from the antitrust violation. *Id.* The Court found no injury because the violation alleged was not the "necessary predicate" of the plaintiff's injury. *Id.* at 404. The injury did not flow directly from the defendants' actions, but rather, the plaintiff's loss of sales resulted from the cancellation of the agreement to use the trademarks, which defendants had a right to do, and not from any anti-competitive activity.

USTC argues in this case that Conwood's injury flowed from the retail agreements that granted exclusive rights to USTC and to others at the expense of Conwood. This argument is unconvincing because there was evidence that Conwood's injury flowed directly from USTC's unauthorized removal and destruction of its racks and POS. Conwood's Rosson also testified that USTC's activity restricted its growth. There was evidence that USTC and not retailers controlled facing decisions and that in making those decisions, USTC sales representatives purposely attempted to bury Conwood's products in USTC racks. (*See e.g.*, J.A. at 2375.) Further, there was evidence that USTC misrepresented the sales activity of its own products to retailers in order to increase the number of facings of its slower moving products despite the fact that other brands by its competitors, including those of Conwood, were better selling. Such activity encompasses the anti-competitive acts about which Conwood complains. Thus, there was sufficient evidence showing that Conwood's injury did flow from USTC's anti-competitive activity. *Valley Products,* 128 F.3d at 404. Further, while the link between the injury and violation must be "proved as a matter of fact and with a fair degree of certainty," it need not be the "sole proximate cause." *See Ezzo's,* 243 F.3d at 990. In sum, there was sufficient evidence for a jury to find that

USTC's anti-competitive activity harmed competition in the moist snuff market and Conwood; and USTC is not entitled to judgment as a matter of law on this ground.

V.

USTC challenges the district court's decision to allow Leftwich to testify as to the damages sustained by USTC's conduct. USTC argues that the district court made no findings regarding the admissibility of Leftwich's report under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). USTC argues that Leftwich's methodology fails because it was constructed solely for this case. USTC also argues that Leftwich's study did not attempt to segregate the effects of other factors that could have contributed to Conwood's low sales in some states, and it made no attempt to test whether the slow growth in certain states was causally linked to any of USTC's conduct. Thus, USTC argues the study did not and could not fit the case at hand.

As a preliminary matter, Conwood argues that USTC waived any challenge to Leftwich's testimony because after the district court ruled that Leftwich's testimony was admissible on a preliminary basis, the court explained that USTC could contest Leftwich's testimony at trial. Conwood asserts that because USTC failed to object to Leftwich's testimony at trial, it has waived our review of the district court's decision to allow Leftwich to testify. We disagree.[5]

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[5] However, apparently for the first time on appeal, USTC argues that Leftwich's regression model cannot be tested, is not subject to ascertainable rate of error and has no basis in the literature. These arguments were not raised below and may not be asserted now on appeal. *See White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559 (6th Cir. 1990) (noting that this Court reviews the case presented to the district court, and not a better one fashioned on appeal, and will not decide issues the parties failed to litigate before the district court).

USTC filed a motion in limine challenging the admissibility of Leftwich's testimony, and the district court correctly concluded that its admissibility was governed by the Supreme Court's opinion in *Daubert*. *See Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 250 (6th Cir. 2001). The district court considered USTC's arguments regarding admissibility under Fed. R. Evid. 702, pertaining to the admissibility of expert witnesses, and found that "Leftwich's testimony satisfies *Daubert*." (J.A. at 90.) USTC also argued that Leftwich's testimony should be excluded under Rule 403 because it lacked probative value and would mislead the jury.[6] Specifically, USTC challenged the factual assumptions that Leftwich tested. The district court held that it could not at that time say that Leftwich's assumptions had no basis in fact, but that USTC might prove differently at trial. In *United States v. Brawner*, 173 F.3d 966 (6th Cir. 1999), we held that where a trial court has made a definitive ruling on the record of the evidentiary issues to be decided, and has not indicated that the ruling is subject to other circumstances or evidence, then counsel need not renew the objection at the time the evidence is offered at trial to preserve the error for appeal. *Id.* at 970; *see also* Fed. R. Evid. 103(a)(2) (holding that once a court makes a *definitive* ruling on the record to either admit or exclude evidence, at or before trial, a party need not renew an objection at trial to preserve any alleged error for appeal). In the instance case, the district court's opinion unequivocally stated that "Leftwich's testimony satisfies *Daubert*." Moreover, after Conwood rested its case, USTC moved for judgment as a matter of law challenging the

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[6] Fed. R. Evid. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

assumptions of Leftwich's damages theory. We therefore do not believe that USTC waived appellate review of Leftwich's damages theory.[7]

USTC does not challenge Leftwich's qualifications as an expert, but only his testimony and damages study. Pursuant to Rule 702 of the Federal Rules of Evidence, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . . ." Fed. R. Evid. 702. In *Daubert*, the Supreme Court "established a general gatekeeping [or screening] obligation for trial courts" to exclude from trial expert testimony that is unreliable and irrelevant. *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 260 (6th Cir. 2001) (citation and internal quotation marks omitted). The district court must determine whether the evidence "both rests on a reliable foundation and is relevant to the task at hand." *Id.* (citation omitted). In assessing relevance and reliability, the district court must examine "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Jahn v. Equine Servs., PSC*, 233 F.3d 382, 388 (6th Cir. 2000) (citations omitted). This involves a preliminary inquiry as to whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the

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[7] We also note that even if USTC had failed to adequately preserve this issue, we would still review it for plain error, and USTC would only be entitled to relief if we determined that its "substantial rights" had been affected. *Brawner*, 173 F.3d at 970 (citations omitted). Regardless of whether we review the issue for plain error or for abuse of discretion, as we explain in the text of this opinion, we believe that the district court did not err in allowing Leftwich to testify regarding the damages Conwood sustained.

facts in issue. *Id.* (citation and internal quotation marks omitted). Some of the factors that may be used in such an inquiry include: (1) whether the theory or technique has been tested and subjected to peer review and publication, (2) whether the potential rate of error is known, and (3) its general acceptance. *Hardyman*, 243 F.3d at 260. "This inquiry is a flexible one, with an overarching goal of assessing the 'scientific validity and thus the evidentiary relevance and reliability' of the principles and methodology underlying the proposed expert testimony." *United States v. Langan*, 263 F.3d 613, 621 (6th Cir. 2001) (citation omitted). "[A] trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co., LTD v. Carmichael*, 526 U.S. 137, 152 (1999); *see also Jahn*, 233 F.3d at 388 (explaining that *Daubert* made clear that Rule 702 relaxes the "traditional barriers" to admitting opinion testimony).

USTC presents no reasoned basis for us to find that the district court abused its discretion in determining that Leftwich's methodology was sufficiently reliable or relevant to survive a *Daubert* challenge. USTC asserts two principal challenges to Leftwich's study and testimony. USTC claims that Leftwich did not relate any of Conwood's loss to specific bad acts by USTC and failed to account for other factors that could have had a negative effect on Conwood's sales. Leftwich used a regression analysis to test Rosson's hypothesis that Conwood's growth was suppressed most in states where it had only a small market share when USTC began its exclusionary practices. He also tested whether the intensity of USTC's misconduct increased in or around 1990. Rosson testified that once his company reached a 15 percent market share, USTC's exclusive vending practices were not as effective.

Leftwich employed three methods to test Conwood's claims: regression analyses, a yardstick test and a before-and-after test. All three are generally accepted methods for proving antitrust damages. *See e.g., Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1238 (3d Cir. 1993) (explaining that if performed properly multiple regression analysis is a reliable means by which economists may prove antitrust damages); *Eleven Line, Inc. v. North Texas State Soccer Ass'n*, 213 F.3d 198, 207 (5th Cir. 2000) (noting that the two most common methods of quantifying antitrust damages are the "before and after" and "yardstick" measures of lost profits).[8]

Leftwich found a statistically significant difference in Conwood's market share between those states in which Conwood had a foothold and those in which it did not. In those states in which Conwood enjoyed a market share of 15 and 20 percent or more, Conwood grew in share, between 1990 and 1997, on an average of 6.5 percent and 8.1 percent, respectively. He concluded that but for USTC's exclusionary acts, Plaintiff's market share would have grown by these same amounts in non-foothold states. Contrary to USTC's arguments, the record indicates that Leftwich ruled out the possibility that the statistical relationship was caused by factors other than USTC's conduct. We find particularly relevant the undisputed evidence that Leftwich examined the possible explanations that USTC's own expert suggested as possible explanations

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[8] "The before and after theory compares the plaintiff's profit record prior to the violation with that subsequent to it [and] the yardstick test . . . consists of a study of the profits of business operations that are closely comparable to the plaintiff's." *Eleven Line, Inc.*, 213 F.3d at 207 n.17. A regression analysis looks at the relationship between two variables. *Rollins v. Fort Bend Independent School Dist.*, 89 F.3d 1205, 1210 n.6 (5th Cir. 1996). The point of a regression analysis is to determine whether the relationship between the two variables is statistically meaningful. *Engineering Contractors Ass'n of South Florida Inc. v. Metropolitan Dade County*, 122 F.3d 895, 917 (11th Cir. 1997).

for Conwood's low market share. Leftwich testified that he tested all "plausible explanations" for his results for which he had data. Employing a regression analysis, Leftwich analyzed whether these other factors could explain Conwood's laggard growth in non-foothold states and concluded that they could not.

Leftwich also employed a before-and-after test to investigate Conwood's claims. Specifically, he tested whether the relationship between Conwood's share of moist snuff sales in a state and the rate of growth in Conwood's share of sales in that same state was the same or different for the seven year period before 1990 as it was for the seven year period after 1990. He found that Conwood's moist snuff market share did not grow significantly more in foothold states in the seven year period before 1990. Thus, there was no correlation in the pre-1990 period between Conwood's foothold status and market share growth rate.

Further, Leftwich employed a yardstick test to examine whether in the related loose leaf tobacco market, in which USTC does not participate, Conwood would always grow more in states where they started out with a high market share. He did not find a statistically significant relationship in Conwood's increase in market share in the loose leaf market between 1990 and 1997 and its share in 1990. In other words, where Conwood enjoyed a high market share or foothold in 1990 in the loose leaf market, it did not necessarily grow more in the period between 1990 and 1997.

USTC complains that Leftwich failed to take into account any USTC "bad act." However, this is not completely accurate. Using USTC's expert's own regression model, Leftwich used sworn affidavits compiled from 241 Conwood sales representatives detailing USTC's unethical activity in their areas. He used this information to construct three alternate measures of USTC's bad acts by state. (J.A. at 4415.) Thus, his damages study was relevant to the issues of

this case. *See Jahn v. Equine Servs*, PSC, 233 F.3d 382, 388 (6th Cir. 2000) (testimony is relevant where there is a valid connection to the pertinent inquiry).

USTC also complains that Leftwich's regression analysis ignored other market variables that could have caused Conwood's harm. However, as explained above, Leftwich ruled out all plausible alternatives for which he had data. Moreover, he accounted for all variables raised by USTC's own expert. In any event, "[i]n order to be *admissible* on the issue of causation, an expert's testimony need not eliminate all other possible causes of the injury." *Jahn*, 233 F.3d at 390 (emphasis added); *see also Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (failure to include variables will normally affect the analysis' probativeness, not its admissibility). In sum, after reviewing the record and giving due deference to the district court's decision, we believe that the district court did not abuse its discretion in concluding that Leftwich's study satisfied *Daubert* and allowing him to testify, subject to vigorous cross examination and an opportunity for Defendant to introduce countervailing evidence of its own. *See Daubert*, 509 U.S. at 596 (holding that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence") (citation omitted).

Finally, USTC contends that Rosson's testimony regarding damages and Leftwich's study were speculative and failed to support the damages awarded. We disagree. USTC essentially argues that a more rigorous standard of proof of damages was warranted. However, it is undisputed that USTC did not object to the jury instructions regarding damages. The jury was instructed that it could not award damages for injuries caused by other factors. As juries are presumed to follow the instructions given, we reject USTC's argument that

Conwood failed to disaggregate the injury caused by USTC as opposed to that caused by other factors. *See Aspen*, 472 U.S. at 604-05.

In addition, an award of damages may be awarded on a plaintiff's estimate of sales it could have made absent the antitrust violation. *J. Truett Payne Co., v. Chrysler Motors Corp.*, 451 U.S. 557, 565 (1981). While USTC demands a more exacting standard, "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *Id.* at 566. "The antitrust cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor imperfections." *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767, 794 (6th Cir. 1970) (citation omitted).

We believe that there was sufficient evidence to support the jury's award of damages in this case. There was testimony that absent USTC's unlawful conduct, Conwood would have achieved market share in the mid-20s. For instance, Rosson testified that had Conwood not been subjected to USTC tactics, it would have had a national market share of approximately 22 to 23 percent. Rosson testified that he had carefully tracked the growth of Conwood's market share over the past 20 years, and its sharp decline in the 1990s was largely due to USTC's tactics. Williams, Conwood's national sales manager, also testified that in those stores where USTC practiced rack exclusivity, Conwood's market share was well below its national average. Such evidence supported Leftwich's damages analysis, and he estimated that Conwood's damages ranged between $313 million and $488 million. The jury awarded damages well within that range. Although USTC argues that there was evidence that undermined Rosson's testimony regarding whether USTC's conduct caused Conwood's injury, the jury heard all of the evidence presented to it, and apparently found other testimony

supporting the award of damages more credible. *South-East Coal Co.*, 434 F.2d at 794 (explaining that whether plaintiff's losses resulted from defendants' conduct or other market factors was for the jury to determine, as was witness credibility). In sum, we believe that there was sufficient evidence to sustain the award in this case.

CONCLUSION

The district court did not err in submitting this case to the jury and denying USTC's motion for judgment as a matter of law. Conwood presented sufficient evidence that USTC's conduct rose above isolated tortious activity and was exclusionary without a legitimate business justification. The evidence also sufficiently showed that USTC's actions injured Conwood and competition in the moist snuff market. Finally, the district court did not abuse its discretion in admitting the testimony of Conwood's damages expert, subject to cross examination and presentation of countervailing evidence. Therefore, we AFFIRM.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed July 19, 2002]

CONWOOD COMPANY, L.P., *et. al.*,
Plaintiffs-Appellees,

v.

UNITED STATES TOBACCO COMPANY, *et.al.*,
Defendant-Appellants.

ORDER

Before: *Clay and Gilman, Circuit Judges; and Edgar,** *District* Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel member but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by Order of the Court

/s/ Leonard Green,
LEONARD GREEN, Clerk

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* Hon. R. Allan Edgar, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

Civil Action No. 5:98-CV-108-R

CONWOOD COMPANY, L.P., *et al.*,
Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, *et al.*,
Defendants.

August 10, 2000, Decided
August 10, 2000, Entered

JUDGES: Thomas B. Russell, *Judge*, United States District Court.

OPINION

This matter is before the Court on Defendants' renewed motion for judgment as a matter of law (doc. # 366-1), and motion for a new trial (doc. # 366-2), or in the alternative, a reduced damages award (doc. # 366-3), and Defendants' motion for permission to conduct post-verdict juror interviews (doc. # 373). These motions are denied for the following reasons.

I. BACKGROUND

Plaintiffs, Conwood Company, L.P. and Conwood Sales Company, L.P. ("Conwood"), brought this antitrust action against United States Tobacco Company, United States Tobacco Sales and Marketing Company, Inc., United States

Tobacco Manufacturing Company, Inc. and UST Inc. ("UST"). Both Conwood and UST manufacture and sell moist snuff smokeless tobacco to retail stores throughout the United States. The United States moist snuff industry makes over $ 1 billion in profits a year. UST controls about 78% of the moist snuff market in the United States with its popular Copenhagen and Skoal brands. Conwood, which manufactures the Kodiak brand, among others, is its largest competitor with about 13% of the market. Only two other companies manufacture and sell moist snuff in the United States, Swisher and Swedish Match.

Moist snuff is sold to consumers at retail stores throughout the United States. Moist snuff comes in a small, round can. The cans are displayed in stores in plastic racks that sit on shelves or counters. The racks contain several slots or facings for different brands of moist snuff. The racks also contain an area where manufacturers can place advertisements. Each manufacturer will provide a rack to retail stores at no charge.

Conwood alleged monopolization and attempted monopolization in violation of the Sherman Act, 15 U.S.C. § 2. At trial, Conwood alleged that, beginning in 1990, UST engaged in a campaign to limit the growth of competition that had begun in the 1980's. The price-value market of moist snuff had been growing in the previous decade. Conwood alleges that the strategy of UST executives was not to compete on price, but to limit the distribution at retail outlets of competing brands of moist snuff. Conwood presented UST documents supporting this allegation. Conwood executives and employees, some UST employees, other competitors and retailers testified about widespread conduct by UST that harmed competitors. This conduct included removing competitors' racks and point of sale advertising, which Conwood claimed was especially harmful because of

government restrictions on other forms of tobacco advertising. Conwood also presented proof that UST misrepresented facts to the retailers and used its position as the industry leader to influence retailers to use UST's racks exclusively and reduce the facings of competitors' brands.

UST was well-represented by counsel and vigorously defended these allegations. UST presented proof that the alleged conduct was ordinary business practice. UST also presented testimony of some retailers indicating that their decisions were made independently of any action by UST.

At the end of a jury trial that lasted over four weeks, the jury found Defendants guilty of antitrust violations. Pursuant to 15 U.S.C. § 15(a), the Court entered judgment in the amount of $ 1,050,000,000 in favor of Plaintiffs, treble the jury verdict of $ 350,000,000. Defendants have moved for either post trial judgment as a matter of law, Fed.R.Civ.P. 50(b), or a new trial under Fed.R.Civ.P. 59(a), or a remittitur.

II. STANDARDS

A. Judgment as a Matter of Law

UST is entitled to judgment as a matter of law if there is "no legally sufficient evidentiary basis for a reasonable jury" to find for Conwood. Fed.R.Civ.P. 50(a)(1). The Sixth Circuit has set forth the standard of review for a Rule 50 motion based on sufficiency of the evidence:

> The evidence should not be weighed. The credibility of the witnesses should not be questioned. The judgment of this court should not be substituted for that of the jury. Instead, the evidence should be viewed in the light most favorable to the party against whom the motion is made, and that party given the benefit of all reasonable inferences. The motion should be granted . . . only if reasonable minds could not come to a conclusion other than one favoring the movant.

K & T Enterprises, Inc. v. Zurich Ins. Co., 97 F.3d 171, 175-76 (6th Cir. 1996).

B. New Trial

Defendants are entitled to a new trial under Fed.R.Civ.P. 59 only if the jury reached "a seriously erroneous result." *Holmes v. City of Massillon*, 78 F.3d 1041, 1045-46 (6th Cir. 1996). Defendants must demonstrate that 1) the verdict was against the weight of evidence; 2) damages were excessive; or 3) the trial was unfair to Defendants. *Id.* at 1046. U.S. Tobacco argues all three points.

"Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 820-21 (6th Cir. 2000).

C. Remittitur

"A motion for a remittitur should only be granted if the award clearly exceeds the amount which, under the evidence in the case, was the maximum that a jury reasonably could find to be compensatory for the plaintiff's loss." *In re Lewis*, 845 F.2d 624, 635 (6th Cir. 1988) (internal quotation marks omitted). "If there is any credible evidence to support a verdict, it should not be set aside." *Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391, 1395 (6th Cir. 1990).

III. MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendants now seek judgment as a matter of law, claiming that Conwood did not prove a single element of its Sherman Act § 2 claim. The offense of monopolization under § 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished

from growth or development as a consequence of a superior product, business acumen, or historic accident." *Re/Max International, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999) (citations omitted). U.S. Tobacco vigorously denies that any of its conduct constituted antitrust violations, and it further objects to the amount of damages that the jury awarded. Defendants argue that to let the judgment stand would "revolutionize" antitrust law. U.S. Tobacco's motion challenges each element of Conwood's monopolization claim. However, U.S. Tobacco does not specifically address the verdict in Conwood's favor on the attempt to monopolize claim.

At trial, UST twice moved for judgment as a matter of law/directed verdict. Both times, this Court found that Conwood had produced enough evidence for a reasonable jury to find in their favor. U.S. Tobacco's current motion for judgment as a matter of law reargues the same points it made to this Court in its motion for summary judgment and motions for directed verdict. The court previously ruled against U.S. Tobacco on the motions, and U.S. Tobacco has not demonstrated to this court why it now should find otherwise.

A. Existence of Monopoly Power

There are two ways for Conwood to establish that UST holds monopoly power. The first is by presenting direct evidence "showing the exercise of actual control over prices or the actual exclusion of competitors." *Byars v. Bluff City News Co.*, 609 F.2d 843, 850 (6th Cir.1979). The second is by presenting circumstantial evidence of monopoly power by showing a high market share within a defined market. *Re/Max Intl., Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999). "In recent years, parties and courts have increasingly moved toward utilizing the circumstantial method as a 'shortcut.'" *Id.* The Sixth Circuit has noted that the "Supreme Court has concluded that an 87% share of the market and over two-thirds of the market both constitute [*8]

monopoly power under § 2." *See PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 821 (6th Cir. 1997) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)).

Conwood presented sufficient circumstantial evidence of monopoly power because UST had at least 74% of the relevant market. Conwood also presented other evidence of UST's control over prices or actual exclusion of competitors. During the alleged period of antitrust activity, no new competitors entered the market. And although UST's market share was shrinking somewhat, its decline slowed during the alleged period of anticompetitive conduct. UST had a very high profit margin and never lowered prices. UST vigorously argued against these allegations at trial, but a jury found otherwise. UST's high market share, coupled with UST's raising prices and high profit margins, and the fact that not a single new firm entered the moist snuff industry after 1990, indicate that it was reasonable for a jury to find that UST possessed monopoly power in the relevant market.

Furthermore, UST did not challenge specifically the jury's verdict in Conwood's favor on its attempted monopolization claim. In the attempt claim, Conwood did not have to prove that UST actually had monopoly power, but that there was a dangerous probability the UST would achieve its goal of monopoly power in the relevant market. The jury found that there was such a dangerous probability.

B. Willful Maintenance of Monopoly Power

The Court's instructions to the jury correctly stated the law on this element:

> Restrictive or exclusionary conduct is conduct that has the effect of preventing or excluding competition or

> frustrating or impairing the efforts of other firms to compete for customers within the relevant market. It is not necessary that such conduct be unlawful in and of itself, apart from its effect in maintaining U.S. Tobacco's monopoly power . . . The acts or practices that result in the maintenance of monopoly power must represent something more than the conduct of business that is part of the normal competitive process or extraordinary commercial success. They must represent conduct that has made it very difficult or impossible for competitors to engage in fair competition.

U.S. Tobacco argues at length that its conduct does not rise to antitrust violations, but rather, constitutes ordinary business practices. U.S. Tobacco argued this to the jury. However, there was extensive evidence presented by Conwood that UST's conduct was not ordinary competition. Conwood presented evidence through witnesses and documents that UST had eliminated competitive distribution in stores, obscured the presence of competitor's advertising and products, and provided misleading data to retailers to obtain exclusive vending. Former UST sales representatives, Conwood sales representatives, and store witnesses testified that UST eliminated competitors' sales racks and point of sale advertising without retailer or competitor consent. Conwood witnesses testified that this activity was widespread. Internal UST documents supported Conwood's theories. Even some current U.S. Tobacco executives would not condone the alleged conduct and refused to say that it was "ordinary business conduct." It was for the jury to determine whether to believe UST's argument that "everybody does it," and it was reasonable for the jury to find that UST willfully maintained monopoly power through restrictive or exclusionary acts or practices.

The evidence supported Conwood's theory that UST's interrelated practices successfully limited competition. UST

once again attempts to divide the practices into discreet, distinct activities, each of which prior courts may have found to be lawful. The case law cited by UST is not persuasive. The moist snuff industry is unique compared to the snack food or soda industry. Point of sale advertising and visibility in the moist snuff industry is very critical because government restrictions severely limit other methods of advertising. *See R.J.Reynolds Tobacco v. Philip Morris, Inc.*, 60 F. Supp. 2d 502 (M.D.N.C. 1999). Defendants argue that no one instance of improper conduct standing alone would lead to § 2 liability. However, taken together, they show a pattern of exclusionary behavior sufficient to support the jury verdict.

C. Injury and Causation

The Court's instruction on this element correctly read:

> For Conwood to establish that it is entitled to recover damages, it must prove that it was injured as a result of U.S. Tobacco's alleged violation of antitrust laws. . . . To establish injury, Conwood must have offered evidence that establishes as a matter of fact and with a fair degree of certainty that U.S. Tobacco's alleged illegal conduct was a material cause of Conwood's injury. This means that Conwood must have proved that some damage flowed to it as a result of U.S. Tobacco's alleged antitrust violation

UST cannot demonstrate that it is entitled to judgment as a matter of law on this issue. Although UST makes legitimate arguments similar to those made to the jury, there is sufficient evidence for the jury to find for Conwood on this element. Both Conwood's chairman and Swedish Match's chairman testified that UST's conduct restricted their growth. Furthermore, Conwood presented expert testimony through Dr. Kamien that there was a direct relationship between the number of facings controlled by UST and higher prices for

consumers. Much of Conwood's proof on this element was based on the credibility of Kamien and Rosson. Apparently, the jury gave much weight to their testimony. Conwood also presented evidence that UST systematically removed their racks and facings, causing Conwood to lose sales. Although Conwood experienced some growth during the period of antitrust activity, its growth was sharply curtailed between 1990 and trial. All of these facts lead the Court to believe that the jury was reasonable in finding for Conwood on this element.

The Court also finds that the jury was reasonable in finding that UST's illegal conduct was a material cause of Conwood's injury. UST argues that other factors caused Conwood's decline in growth, such as the independent, uncoerced decisions of retailers, additional competition from other manufacturers and Conwood's failure to compete. UST ignores the evidence that it limited competitor's distribution without retailer consent. Nothing indicates that the jury did not consider UST's arguments.

D. Damages

The Court's instruction correctly stated the law:

> If you find that U.S. Tobacco either monopolized or attempted to monopolize in accordance with these instructions, the law provides that Conwood should be fairly compensated for all damages to its business or property that were a direct result or likely consequence of the conduct that you have found to be unlawful. . . . You may not, however, calculate damages based only on speculation or guesswork, and you must remember that you can award Conwood damages only for injuries caused by a violation of the antitrust laws. You may not award damages for injuries or losses caused by other factors.

As it did with Defendants' motions for directed verdict, the Court again rejects Defendants' argument that Conwood's proof of injury and damage is based on speculation. Although the court did characterize Plaintiff's damage proof as weaker than its proof of the other elements, UST is not entitled to judgment as a matter of law. The Court should not substitute its judgment for that of the jury where a reasonable jury could find for Conwood.

The jury awarded Conwood $350 million in damages. Although this amount is high, it is supported by a legally sufficient evidentiary basis. Conwood presented expert testimony through Dr. Leftwich that UST's antitrust activity caused between $155 and $488 million. Conwood's chairman's testimony also supported Leftwich's analysis. UST thoroughly cross-examined Leftwich about his opinions and theories, as well as Rosson. The high profit margins of moist snuff sales, the length of the antitrust activity and the decline in Conwood's growth support Leftwich's range of damages for lost profits. The fact that the jury awarded damages in the mid-range indicates that the jury adequately considered only those damages that were a direct result or likely consequence of UST's unlawful conduct.

In conclusion, while the Court may not have reached the same verdict, the evidence supports the jury's verdict. In their argument, UST ignores the primary factor that most likely results in an adverse verdict. At trial, UST's counsel and CEO clearly recognized that the videotaped testimony of several key UST employees was damaging. The CEO even testified that he was "embarrassed" by some of the testimony. While UST argued that such testimony was not reflective of their conduct and intentions, it is clear that the jury felt otherwise. Any reviewer of this record should observe the videotapes of the UST representatives presented by Plaintiff during their proof to have a true picture of their testimony.

IV. MOTION FOR A NEW TRIAL

To receive a new trial, Defendants must demonstrate that 1) the verdict was against the weight of evidence; 2) damages were excessive; or 3) the trial was unfair to Defendants. *Holmes v. City of Massillon*, 78 F.3d 1041, 1046 (6th Cir. 1996). U.S. Tobacco argues all three points.

The challenged verdict must be unreasonable before the Court can grant a new trial. *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 820-21 (6th Cir. 2000). The verdict was not against the weight of evidence. UST focuses on the evidence that supports its position. However, there was much contrary evidence supporting the verdict. Even if the Court feels that a verdict in favor of UST would have been more reasonable, it cannot set aside the jury verdict. *Id.*

U.S. Tobacco argues that the damages were excessive. The jury's damage award was well within the range that Conwood proved at trial. Once again, the court does not find that Conwood's damages evidence was mere speculation. Proving antitrust damages involves complicated matters of economics. Both parties had expert witnesses who gave contradictory testimony on damages. In such a case "where the jury was free to determine which expert to believe, this Court should not disturb the jury's decision." *See Morales v. American Honda Motor Co., Inc.*, 151 F.3d 500, 506 (6th Cir.1998).

U.S. Tobacco claims that many of this court's rulings caused it to have an unfair trial. Neither party hesitated in providing numerous opportunities for the Court to make rulings of record. In each case the Court carefully considered the arguments of counsel and attempted to make fair rulings that followed the law. UST believes that this Court's rulings on its motion for summary judgment, motions in limine, and the Court's evidentiary rulings during trial were so erroneous that UST did not receive a fair trial. Obviously, this Court does not believe that its rulings were in error, or it

would not have ruled so. This Court will not revisit those rulings individually. UST may raise those issues on appeal.

V. REMITTITUR

Beside expert evidence that Conwood suffered no damages, U.S. Tobacco chose not to present alternate damage evidence. Now it seeks the Court to fashion a new award based on evidence that was never presented at trial. Conwood presented evidence that UST caused it to suffer over $450 million in damages. The jury awarded damages well within the range argued by Conwood. Plaintiffs motion for a remittitur is denied because the jury award is not "beyond the maximum damages that a jury reasonable could find to be compensatory for a party's loss." *Farber*, 917 F.2d at 1395.

VI. JUROR INTERVIEWS

Generally, the Court does not allow the parties to conduct post-trial juror interviews. Jurors provide a tremendous public service, especially to the parties and the court. The court reimburses jurors for their expenses, but they lose their income and their time from business, family and friends. The jurors in this case served faithfully for over four weeks. They should not be subject to further questioning absent good cause. Defendants have not demonstrated any compelling reason to contact jurors. Defendants argue that they only seek to gain an understanding of what marketing practices were unlawfully exclusionary. Plaintiffs have filed a motion for permanent injunctive relief. The Court's ruling on that motion will negate the need to interview jurors.

An appropriate order shall issue.

This is the 10 day of August 2000.

Thomas B. Russell
Judge, United States District Court

ORDER

Defendants having filed a motion for judgment as a matter of law, and a motion for a new trial, or in the alternative, a reduced damages award, Plaintiffs having responded, and upon consideration by the Court,

IT IS ORDERED:

Defendants' motion for judgment as a matter of law (doc. # 366-1), and motion for a new trial (doc. # 366-2), or in the alternative, a reduced damages award (doc. # 366-3) are DENIED. Defendants' motion for permission to conduct post-verdict juror interviews (doc. # 373) is DENIED.

This is a final and appealable order. There is no just cause for delay.

This is the 10 day of August 2000.

Thomas B. Russell
Judge, United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
W.D. KENTUCKY
PADUCAH DIVISION

No. 5:98-CV-108-R

CONWOOD CO., L.P. and CONWOOD SALES CO., L.P.

v.

UNITED STATES TOBACCO CO., United States Tobacco Sales and Marketing Co. Inc., United States Tobacco Manufacturing Co. Inc., and UST Inc.,

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Aug. 10, 2000

MEMORANDUM OPINION

RUSSELL, D.J.

This matter is before the Court on Plaintiffs' motion for a permanent injunction (docket # 374) and Defendants' motion for a hearing on Plaintiffs' motion for permanent injunctive relief (docket # 397).

As an initial matter, Defendants have not demonstrated that an oral argument on the motion for permanent injunction is necessary. A four week jury trial was held and the factfinder, the jury, found UST violated antitrust laws. This motion can be decided on the pleadings and court record.

In their motion for a permanent injunction, Plaintiffs have requested the following provisions: 1) UST shall not "eliminate, remove, deface, alter, obscure or otherwise manipulate any competitor's smokeless tobacco products, vending systems, counter displays or other advertising" unless it has written consent from the competitor; 2) UST shall not

influence others "by agreement, through financial incentives, misrepresentations or otherwise adversely affect the placement or selection of any competitor's smokeless tobacco products, vending systems, counter displays or other advertising;" and 3) UST shall appoint an independent committee of its board of directors to monitor and enforce compliance with the order.

Federal antitrust laws state, "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, . . . against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26. In seeking a permanent injunction under 15 U.S.C. § 26, Plaintiffs must demonstrate a "significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Bender v. Southland Corp.*, 749 F .2d 1205, 1214 (6th Cir. 1984). A jury already has determined that UST committed antitrust violations, and this court has rejected Defendants' posttrial motions to vacate or reverse the verdict. The evidence at trial and the jury verdict demonstrate that UST's strategic campaign to limit distribution succeeded in harming competition and consumers. The issue is whether UST's antitrust violations will continue or recur. *See* 15 U.S.C. § 26; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969).

The Court finds that it is likely that the violations will continue. In post-trial pleadings and public statements, UST refuses to admit that any of its business practices violate antitrust laws. UST maintains that it will not change the way it markets its products even in light of the jury verdict. Conwood has presented affidavits of its sales force that indicate that UST's campaign to restrict competitors' distribution has continued after the verdict. Because UST will not alter its business practices voluntarily, a court-ordered permanent injunction is necessary. *See United States v. Microsoft Corp.*,

97 F.Supp.2d 59 (D.D.C.2000) (ordering equitable relief where monopolist refuses to admit wrongdoing and will not alter conduct voluntarily).

The court may issue an injunction to restore competition, even if the injunction prohibits conduct that would otherwise be legal. *See United States v. Loew's*, 371 U .S. 38, 53 (1962). The Court has carefully considered Plaintiff's proposed order as well as Defendants' objections to its provisions. UST must cease certain anticompetitive conduct, but it is not necessary for the Court to appoint an independent committee to UST's board of directors to enforce compliance with the order.

An appropriate order shall issue.

ORDER FOR PERMANENT INJUNCTIVE RELIEF

Pursuant to 15 U.S.C. § 26, the Court orders that defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company, Inc., United States Tobacco Sales and Marketing Company, Inc., United States Tobacco Manufacturing Company, Inc. and UST, Inc. and all persons acting in concert with defendants (collectively, "UST") shall be enjoined for a period of five (5) years as follows:

I. UST shall not:

(a) Eliminate, remove, deface, any competitor's smokeless tobacco products, vending systems, counter displays or other advertising (including, but not limited to, "point of sale" advertising such as "header cards"), except with the prior written consent of the relevant competitor, such consent not to be unreasonably withheld, or unless directed to do so by the retailer.

(b) induce, influence materially cause or seek to cause any other persons, by agreement, through material misrepresentations to remove, deface, alter or otherwise adversely affect the placement or selection of any

competitor's smokeless tobacco products, vending systems, counter displays or other advertising (including but not limited to "point of sale" advertising such as "header cards").

Any party may seek modification of this Order, at any time, by written motion and for good cause based on changed circumstances or otherwise.

This Order is based on 15 U.S.C. § 26, the accompanying Memorandum in Support of Plaintiffs' Motion for Permanent Injunctive Relief, the jury verdict, the trial record, and the pleadings and filings in this matter.

This Court shall retain jurisdiction to enforce this Order. This Order will be enforceable against all defendants in this lawsuit, and any and all other persons, affiliated or acting in concert with those persons. In the event that any part of this Order is violated by any of named defendants or other persons, the plaintiff may, by motion with notice to the attorneys for the defendants, apply for sanctions or other relief that may be appropriate.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CASE NO. 5:98CV-108-R

CONWOOD COMPANY L.P., *et al.*
Plaintiffs,

v.

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC.
Defendants.

MEMORANDUM, OPINION AND ORDER

INTRODUCTION

This antitrust case is before the court on the motion for summary judgment of defendant United States Tobacco ("UST") (Docket#208) and the cross-motion for partial summary judgment of Conwood Company (Docket #207). In this extensively litigated case, Conwood has challenged the moist snuff marketing practices of its rival UST. For the reasons set out below, the court concludes that only through the development at trial of a full factual record can there be an appropriate determination of whether UST's practices concerning exclusive racks and exclusive point-of-sale advertising constitute the illegal maintenance of monopoly power through anticompetitive practices. Likewise, market definition issues cannot be decided without a trial. Accordingly, the court will deny the motions for summary judgment.

FACTUAL BACKGROUND OF THE ANTITRUST LITIGATION

This case involves moist snuff,[1] a form of tobacco used orally by consumers by placing a small amount between the cheek and gum. The product is generally sold in round cans in retail stores, including convenience markets, mass merchandisers such as Wal-mart, and other outlets where snacks, sodas, cigarettes, and other convenience items can be readily bought. The cans are typically kept by the retailer in a gravity-fed rack, so that cans drop down through slots, also called "facings." These racks are often located by the check-out counter. The racks, in addition to storing the cans, also provide a place for point-of-sale advertising, sometimes referred to as "header cards." The number of slots in a rack is significant, as it affects not only the overall size of the rack but the number of products which a customer will see. As is common in consumer product merchandising, the placement of the rack, the arrangement of the point-of-sale advertising, and the display of competiting products within the racks are all areas of competition among moist snuff manufacturers. Each manufacturer wants its product displayed most prominently and strategically, and wants to maximize its point-of-sale advertising.

Point-of-sale advertising is commonplace in convenience merchandising, whether it involves colas, beer, snack foods, or other products. According to Conwood, however, it assumes an unusual importance in the tobacco industry, because of the significant limitations which state and federal law place on media advertising of tobacco products. While consumers can enjoy the antics of the Budweiser lizards or

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[1] There is an issue at trial concerning product market definition, but for purposes of this analysis, the court will restrict itself to a discussion of moist snuff. See opinion below at 15-16.

the Energizer bunny, there is no comparable television and radio exposure for tobacco companies. Thus, in the Conwood theory, point-of-sale advertising is especially critical because it represents the principal means of communicating with consumers. In the plaintiff's view, any restrictions on point-of-sale advertising are likely to have a seriously dampening effect on competition.

Conwood asserts that it moved from being a small player in the moist snuff market to presenting a significant challenge to UST, through the introduction of new "rough-cut" and "long-cut" products, through the introduction of different product packaging in the form of plastic cans with longer shelf lives, and through the introduction of price-competitive "price-value" products. These facts, if proven at trial, would tend to show the kind of "merits" competition which markets ideally provide, in which price and product innovation drive competition and provide benefits to consumers.

Conwood's proof developed in discovery, to some extent, tends to show that, in response to growth in the price-value market, UST engaged in a campaign, directed by high-level management, to "actively pursue strategies to limit the growth of the price-value market." Arguably, the strategy selected by UST management was not to compete on price (a strategy which apparently caused a stunning one-day drop in the market valuation of Philip Morris stock when it cut cigarette prices), but to limit the distribution at retail outlets of competing brands of moist snuff. This strategy, as Conwood paints it, was designed to "eliminate competitive distribution" and to seek "exclusive vending" and "vendor exclusivity."

Of course, generalized statements by corporate executives in internal documents do not by themselves constitute antitrust law violations. However, the proof which Conwood has developed through discovery could show that a highly focused UST campaign sought to have its vending racks be

the exclusive outlet for all moist snuff in retail stores. The effect of such rack exclusivity would be to give UST control over the point-of-sale advertising, since all header cards would have to be displayed on UST racks. In addition, such an arrangement, in which all products from all manufacturers are dispensed from UST racks, would tend to allow UST to reduce significantly the kinds and numbers of competitive products displayed by the retailer.

Conwood's discovery proof arguably demonstrates that UST's efforts to eliminate competing racks were significantly successful. This elimination of competing racks was accomplished through a variety of sophisticated techniques, including "crew drives," the use of the alleged subterfuge of "category management" services to small retailers as a method to elbow out Conwood and other competing products, and unilateral conduct such as UST sales personnel "cleaning up" the display areas. Conwood has developed evidence that it was the practice of UST sales personnel to obtain nominal permission to remove racks from harried and inexperienced convenience store employees who might lack the knowledge or gumption to resist the control which UST sales personnel exerted over the displays. Conwood also used explicit contractual agreements with retailers.

Conwood's proof further tends to demonstrate that the effect of these "exclusive vending" practices was to reduce the space allocated to moist snuff in retail outlets, to exclude competing advertisements at the point-of-sale, to increase slot width in the racks so as to make fewer consumer choices available, and to manage the presentation of products in the UST racks so that slow-moving UST products would "crowd out" price-value products by occupying scarce slots in the racks. In addition to an organized category management program, UST also pursued a Customer Alliance Program ("CAP") which arguably required preferred positioning for UST products and POS advertising.

The court emphasizes that it does not here find that Conwood will succeed in proving that these events occurred, or that they occurred to the extent alleged, but only that Conwood has raised sufficient factual basis for the issues to be presented at trial rather than rejected through summary judgment.

AN OVERVIEW OF THE PARTIES' ARGUMENTS

In a carefully and vigorously argued series of pleadings which focus on certain specific antitrust issues, UST asserts that Conwood has failed to make out a triable § 2 antitrust case against it. For purposes of the summary judgment motion only, UST does not challenge many of Conwood's factual predicates. UST, for example, does not contest in this motion that it possesses monopoly power, although it seriously disputes that it has acquired and maintained it willfully. (UST memorandum in support of summary judgment at p. 14.) Likewise, in its reply memorandum, UST does not contest that it has acted with the intent to eliminate as much competitive distribution as possible; that it has acted to obtain exclusive rack and rack-P.O.S. agreements with retailers; or that its conduct has made it difficult for Conwood to place its products and to increase its sales. (UST reply memorandum at pp. 5-6).

Instead of contesting directly many of the principal factual assertions, UST rather argues that, even under the best view of these facts which Conwood might prove, Conwood cannot establish either an antitrust violation or antitrust injury. UST contends that Conwood cannot establish any "exclusionary" conduct in violation of § 2 of the Sherman Act. (UST memorandum at p. 14). Rather than directly meet Conwood's factually detailed assertions of willful exercise of monopoly power, UST characterizes its practices as failing to meet a narrow test of § 2 violations. For example, UST argues that its exclusionary rack practices cannot be illegal because they do not constitute the kind of exclusive dealing which would

be condemned under other sections of the antitrust laws (see memorandum in opposition at pp. 17-21), and asserts that the other misconduct is nothing more than "ordinary business practices" (UST memorandum in opposition at pp. 25-37). UST continues this line of argument in its reply memorandum, contending that Conwood's case is a fatally thin "monopoly broth" which fails to prove any independent antitrust violation (UST reply memorandum at pp. 18 et seq.).

Conwood, in response to the UST motion, has prepared a highly detailed and possibly credible factual case based on extensive discovery, both documentary and by deposition. While it remains to be seen whether Conwood's assertion of the facts will be proven persuasively at trial to the jury, its factual chronology, if true, appears to assert an abuse—a willful exercise—of monopoly power by UST.

Conwood's case centers on a variety of interrelated practices which, in its view, constitute a coordinated, effective course of action by a monopolist which already enjoys a very high market share, profit margins among the highest in American industry, and limited competition without new market entrants. Most importantly, Conwood's version of the facts, if proven, could be interpreted by the jury to constitute a serious effort by a monopolist to suppress a competitor, not through competition on price, product innovation, or other merits, but based on exclusionary practices which are uniquely available to UST because of its longstanding market dominance. Moreover, Conwood contends, UST's practice of excluding Conwood from point-of-sale advertising is unusually effective because of the many restrictions which federal and state law place on the advertising of tobacco products; thus, restricting or eliminating point-of-sale advertising by Conwood arguably has an unusually restrictive impact on Conwood's ability to compete based on price, product innovation and design, and the like.

The court is very careful to note that it does not adopt or endorse Conwood's view of the facts. Whether Conwood can persuade a jury, after a trial with witnesses and experts, of the truth of its case theory is not for the court to say on summary judgment. The issue before the court now is whether a trial is the appropriate procedure to resolve these factually intensive and hotly disputed claims.

LEGAL STANDARDS AND ANALYSIS

Both Conwood and UST point to the same general standard to applied to § 2 claims, stemming from the venerable *Grinnell* decision of the Supreme Court. As the Sixth Circuit recently observed,

> The offense of monopolization under Section 2 has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

Re/Max International, Inc. v. Realty One, Inc., 173 F.3d 995 (6th Cir. 1999). Only the "willful acquisition or maintenance" part of the test is at issue, as UST assumes *arguendo* for summary judgment purposes that it possesses monopoly power. (UST memorandum at p. 14.)

It is the application of the *Grinnell-Re/Max* standard to these facts which is in dispute. UST vigorously argues that Conwood falls far short of the mark, and that its "monopoly broth" is really nothing more than "stone soup." In pressing this argument, UST repeatedly asserts that Conwood has not proven exclusive dealing by UST, that isolated incidents of bad behavior and "dirty tricks" in handling Conwood racks

are not the stuff of antitrust lawsuits, and that Conwood has pointed to nothing more than vigorous competition of the kind invited, not condemned, by the antitrust laws.

There are two shortcomings in UST's argument. First, its abstract treatise on antitrust laws sidesteps the carefully developed, thoroughly documented record which Conwood has amassed. Whether Conwood can prevail at trial on its theories is uncertain, but Conwood has marshalled a significant amount of proof that UST engaged in a concerted campaign, directed from the highest levels of UST, designed to shut Conwood out from effective competition at retail outlets through the elimination of Conwood racks, the elimination of Conwood point-of-sale advertising, all in an unusual market for tobacco products where point-of-sale is the central marketplace battleground. Second, as discussed below, UST's attempts to pick apart Conwood's arguments would have the court examine the leaves and ignore the forest, something not mandated by the antitrust laws.

"'Anticompetitive conduct' can come in too many forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." *Carribean Broadcasting System, Ltd. v. Cable & Wireless*, 148 F.3d 1080, 1087 (D.C. Cir. 1998). Thus, UST's "deconstruction" of the Conwood claims into a series of discrete antitrust theories, which UST then individually seeks to knock down, does not compel the summary judgement dismissal of this case. *Caldera , Inc. v. Microsoft Corp.*, Case No. 2:96-CV-645(B), 1999 WL 1067490 (D. Utah Nov. 3, 1999). Instead, the court should use as its touchstone well-accepted principles of § 2 law.

The key to the second prong of the *Grinnell* test is the use by a defendant of anticompetitive conduct "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 482-83 (1992) (quoting *United States*

v. Griffith, 334 U.S. 100, 107 (1948)). The Supreme Court has directed the trial courts to condemn "exclusionary" or "anticompetitive" or "predatory" conduct, *see*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985); the court must distinguish the improper "exclusionary" conduct from the permitted competition by a monopolist based on "superior product" and "business acumen," as permitted by *Grinnell*.

The distinction between the impermissible anticompetitive conduct by a monopolist and the lawful maintenance of its market share is based on determining if the defendant "has been 'attempting to exclude rivals on some basis other than efficiency.'" *Aspen*, 472 U.S. at 605, (quoting R. Bork, *The Antitrust Paradox* 138 (1978)). The Supreme Court in *Aspen* went on to quote from Professors Areeda and Turner:

> Thus, 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.

III P. Areeda & D. Turner, *Antitrust Law* 78 (1978). An important part of the inquiry, as directed by the *Eastman Kodak* Court, is whether conduct which impairs a rivals' opportunities can be justified by "valid business reasons." *Eastman Kodak*, 504 U.S. at 483, (quoting *Aspen*, 472 U.S. at 605). In *Eastman*, the Court held that there were triable issues of monopolization where there were reasons to doubt the validity and sufficiency of the business justifications asserted for the conduct.

Here, UST does not, at the summary judgment stage of the proceedings, attempt to show conclusively that the restrictions on the use of Conwood racks and Conwood POS were justified by business reasons; rather, it argues that the restrictions could never constitute violations at all. This falls short of the proof which would be required to prevail on the

§ 2 claims, particularly in view of the numerous record comments from high level UST personnel which arguably show an anticompetitive intent rather than a business justification for the exclusionary POS practices. Other circuits have focused on the issue whether the defendant's conduct served a legitimate purpose and whether it impaired the opportunity of rivals more than necessary to serve such a legitimate purpose. See, e.g., *Data General Corp. v. Grumman Syst. Support Corp.*, 36 F. 3d 1147 (1st Cir. 1994); *Instructional Syst. De el. Corp. v. Aetna Casualty & Surety Co.*, 817 F.2d 639 (10th Cir. 1987).

At a minimum, these issues require the development of proof at trial, not summary disposition. While UST is correct that there is no rule which makes summary judgment improper in all circumstances in antitrust cases, their factual nuances and complexity may require a full rather than a truncated inquiry, for monopolization as well as other claims.

Recent Sixth Circuit case law demonstrates the need of the district court to apply careful restraint in using summary judgment to reject antitrust claims. In *Re/Max Int'l. Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999), the court overturned a grant of summary judgment to the defendants which had been entered by the trial court.. The challenged trade practice in the *Re/Max* decision was significantly different from this case; the plaintiff realty firm disputed the "adverse split" policy of the defendants with respect to the division of real estate commissions between buyers' agents and sellers' agents. The lengthy opinion discusses a number of § 1 problems, but also addresses the issue whether summary judgment was appropriately entered on behalf of the defendants on plaintiff's § 2 monopolization claim. In a detailed discussion of the factors which may be used to prove the relevant geographic market and what a plaintiff must show alternatively to prove exclusion of competition in a monopolization case, the Sixth Circuit held that there was a

question of fact whether there had been "actual, sustained adverse effects on competition." *Id.* at 1019. Similarly, the present case presents complex questions of fact, which can be resolved only through trial, as to whether the sustained effects on competition which are preliminarily suggested by plaintiff's proof in the discovery record can be proven sufficiently before a jury.

One recent decision is worth particular mention. In *R.J. Reynolds Tobacco v. Philip Morris Inc.*, 60 F. Supp. 2d 502 (M.D.N.C. 1999), the trial court granted a motion for preliminary injunction in a case involving a challenge to a Philip Morris promotional program which gave preferred position to Philip Morris products in retail outlets. In ruling that this program likely constituted exclusionary conduct, the trial court lent significance to the advertising restrictions in the tobacco industry, which apply to moist snuff as well as to cigarettes:

> [V]isibility and advertising at the point of purchase are uniquely critical to competition in the cigarette industry as competitors lack significant alternative advertising channels to compensate for the lack of visibility at the point of purchase.

Id. at 511. Thus, other trial courts have found that point-of-sale restrictions may have an unusually strong exclusionary effect in the tobacco industry because of restrictions on broadcast media advertising.

UST also argues that summary judgment is appropriate in its favor because Conwood's case is flawed in its attempt to prove that antitrust injury flowed from the supposed violations of the Sherman Act; alternatively, it argues that the damages asserted are speculative and are not caused by the actions of UST.

This theory, like the summary judgment argument on the question whether the Sherman Act was violated, must fail

because of the fact-intensive nature of the dispute at bar. Multiple issues concerning injury, damage, and causation remain for trial. Included in these topics are the issue whether the damage claimed by Conwood is caused by UST, or instead is the result of independent, uncoerced decisions by retailers; whether the damage theory of Professor Leftwich, plaintiff's expert, can withstand challenge under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), or other antitrust damage law principles; whether the effects on competition and on Conwood which plaintiff claims are the result of actions by UST at all, or other market forces; and other matters.

None of these topics is susceptible to resolution on the current record, without the testing of facts which a jury trial presents. The law in the Sixth Circuit does not require the district court to "short circuit" such a potentially complex inquiry without a trial. Plaintiff need only show an injury of the type which the antitrust laws were drafted to prevent and which flows from defendant's unlawful practices. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Arthur S. Lengenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050 (6th Cir.1984); *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981). The court does not wish to underemphasize the burden which plaintiff must meet at trial, but only to indicate that the detailed record on discovery prevents the summary disposition of issues.

The court re-emphasizes that the questions of whether these practices took place, how extensive they were, how much they were orchestrated by top management and how much by sporadic local efforts by "rogue" sales personnel, how effective they were in restraining or eliminating competition, whether they were eagerly sought by retailers or imposed by fast-talking, experienced UST representatives on sleepy seventeen year old nighttime sales clerks—all these

are issues which can be resolved only by a jury. The court does not presume to determine how they will be resolved—only that they present serious issues of material fact.

CONWOOD MOTION FOR PARTIAL SUMMARY JUDGMENT

Conwood itself has moved for partial summary judgment with respect to the issues of whether the relevant market is moist snuff in the United States, and whether UST possesses monopoly power in that market. In addition, Conwood seeks summary disposition of UST's counterclaims under the Lanham Act and state law.

Just as there are many "hotly disputed" questions of fact on the § 2 liability claims of Conwood, so too are there many "hotly disputed" questions of fact on market definition which prevent a summary ruling. (See UST memorandum in opposition to plaintiff's motion for summary judgment at p. 3.) While UST agrees that the relevant geographic market is the entire United States (see fn. 2 at p. 2 of its memorandum in opposition), UST seriously disputes the product definition offered by Conwood. UST asserts that there are questions of fact for the jury as to whether the relevant product market is broader than Conwood asserts, perhaps including all smokeless tobacco products, such as loose leaf chewing tobacco; alternatively, UST suggests that the product market could be segmented into separate product markets for natural and flavored moist snuff.

It is undisputed that Conwood, as plaintiff, has the burden of proving market definition. Given the extensive nature of discovery and conflicting factual accounts of the marketplace, the prevalence of serious expert opinion disagreements, and the obvious factor that the court is denying UST's summary judgment motion and setting the matter for trial, it would be unwarranted (and inconsistent) for this court to rule in a

summary fashion on the product market. *See Telecomm. Tech. Servs., Inc. v. Siemens Rolm Communications, Inc.*, 66 F. Supp.2d 1306 (N.D.Ga. 1998). Indeed, virtually everything about this litigation is, in UST's accurate characterization, "hotly disputed," and only a trial can resolve these issues.

Finally, in light of the denial of summary judgment both on the section two liability and product market motions, there is no basis for granting summary judgment to Conwood on UST's Lanham Act and state law claims. They may indeed prove out to be minor "tag along" theories, but the court will overrule Conwood's motion and permit them to proceed to trial with the vastly more extensive antitrust issues.

Ultimately, the present issue for the court is whether it should step into this complex, extensive litigation and call it to a halt without a trial. In order to do so, the court would have to conclude that there is no dispute of *material* fact. UST's argument concedes, for summary judgment purposes only, many of the facts which Conwood would have to prove at trial, thus nimbly taking many disputed issues out of the analysis. Instead, argues UST, taking the best version of the facts which the record might show for Conwood, there still is lacking any antitrust violation. However, this is simply too narrow a view of this dispute, and the court cannot say with certainty that no trial should take place in order to measure the extent, purpose, effect, and competitive impact of the broad exclusionary campaign which Conwood seeks to prove. Whether Conwood can carry this significant burden at trial is not for the court to say on summary judgment; however, the court concludes that on a cold summary judgment record it cannot resolve this matter fairly or within the meaning of Rule 56 and applicable case law on summary judgment practice. Likewise, the issues of product market definition cannot be determined summarily.

A trial is unavoidable; indeed, a trial is the very device which the law contemplates for the resolution of this kind of dispute.

CONCLUSION

Skillful counsel for both sides have vigorously presented the court with a broad range of briefing on critical issues in this case. While each case is unique on its facts, the factual bases asserted by Conwood here are sufficiently within the range of conduct which, if proven at trial, may form the basis for a jury determination of § 2 liability. Whether a jury, with the benefit of a full factual presentation, will assess UST's conduct as justified, vigorous competition in the marketplace, or an impermissible, unjustified series of exclusionary acts by a monopolist, is an issue which this court cannot decide on summary judgment. The case abounds with material factual issues, it presents an adequate legal foundation to withstand motion practice, and it will be judged at trial and not on briefs alone. The motions for summary judgment of both UST and Conwood are denied. (Docket #s207 & 208)

IT IS SO ORDERED.

This 17th day of February, 2000.

Thomas B. Russell, Judge.
United States District Court

Copies to: Counsel of Record

APPENDIX F

TITLE 15.—COMMERCE AND TRADE

CHAPTER 1.—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

15 U.S.C. § 2 (2002)

§ 2. Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

TITLE 15.—COMMERCE AND TRADE

CHAPTER 1.—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

15 U.S.C. § 15 (2002)

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(2)

No. 02-603

Supreme Court, U.S.
FILED
NOV 20 2002
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

UNITED STATES TOBACCO COMPANY, ET AL.,
Petitioners,

v.

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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November 20, 2002

37 pp

QUESTIONS PRESENTED

1. Whether sufficient evidence supported the properly instructed jury's verdict that an admitted monopolist violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by, among other things, systematically removing and destroying hundreds of thousands of competitors' display racks, "point of sale" advertising, and products, and entering into more than twenty thousand contracts that prevented stores from displaying or advertising competitors' products, where the evidence showed that this exclusionary conduct led to higher prices and fewer choices for consumers and where the monopolist conceded that the conduct had no legitimate business purpose.

2. Whether sufficient evidence supported the properly instructed jury's award of $350 million in damages for an admitted monopolist's systematic and successful multi-year campaign to "eliminate competitive distribution" and thereby to preserve "the highest profit margin of any public company," where testimony from multiple witnesses (most of whom were unchallenged by the monopolist) estimated damages between $313 and $488 million.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

Respondents Conwood Company, L.P., and Conwood Sales Company, L.P., are neither publicly traded companies nor subsidiaries or affiliates of a publicly owned corporation.

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INTRODUCTION

The petition presents only a challenge to the sufficiency of the evidence. USTC does not allege here a single error of law in the month-long trial: no error in the jury instructions – which USTC approved; no error in the admission or exclusion of evidence; and no claim that USTC was restrained in any way from challenging Conwood's witnesses or arguing its version of the facts to the jury. USTC concedes, moreover, that the jury properly found that moist snuff constitutes the relevant market and that USTC, with 77 percent of that market at the time of trial, was a monopolist with the power to raise prices, restrict output, and exclude competition.

The sole basis for USTC's petition is its claim that the evidence – consisting of 66 witnesses and 364 representative documents – was insufficient as a matter of law to support the jury's findings that USTC illegally maintained its monopoly through exclusionary conduct and that Conwood suffered damages thereby of $350 million. The court below carefully reviewed the voluminous trial record and concluded that there was "ample documentary and testimonial evidence" to support the judgment. Pet. App. 30a. This Court does not sit to reweigh evidence that two lower courts have already found sufficient. As to damages, USTC concedes that the jury was properly instructed that it could only find damages due to USTC's antitrust violation. The jury's award was supported by extensive evidence, from varied sources, which USTC admits that the jury could properly consider and which it does not challenge here.

USTC asserts as many as 10 "conflicts" on myriad issues, but the Sixth Circuit itself perceived no conflict with any other court on any issue, and for good reason. The cases that USTC cites as supposedly in "conflict" all involved the application of settled legal principles to completely different factual situations.

STATEMENT

1. For almost a century, USTC was the only U.S. producer of moist snuff. Pet. App. 4a. Respondent Conwood entered the market in the late 1970s and made some initial inroads on USTC's monopoly market share. *Id.* But by the mid-1990s, Conwood's growth had been stopped at approximately 13½ percent. The only other two companies in the market, Swedish Match and Swisher International Group, had shares of 6 and 4 percent, respectively, and were likewise stymied in their efforts to grow. *Id.*

USTC raised its prices approximately 8-10 percent per year between 1979 and 1998. *Id.* at 5a. In 1999, USTC earned nearly $1 billion in profits from its moist snuff business and had "the highest profit margin of any public company in the country." *Id.* at 4a. Yet there was no new market entrant after 1990, and USTC still controlled 77 percent of the market in 1999. *Id.* at 5a. As Professor Kamien of Northwestern University's Kellogg Graduate School of Business explained, only a monopolist exercising market power can maintain such huge profit margins and impose such consistent price increases (at more than double the rate of inflation), while forestalling entry and maintaining such a large market share. Trial Tr. 609-10.

2. Conwood brought this suit against USTC for, *inter alia*, illegal maintenance of monopoly and attempted monopolization, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The trial evidence established that:

Beginning in the early 1990s, USTC perceived a threat to its monopoly from the innovative products, packaging, and accelerated marketing efforts of Conwood, Swedish Match, and Swisher. USTC's concerns were intensified when, in the mid-1990s, Conwood and Swedish Match introduced "price value" or half-priced brands of moist snuff. USTC believed that competition, and particularly price-value competition, was likely to erode its profits.

USTC recognized that it could compete on price and quality. "If we were willing to lower our margins and reduce prices, we could stop the segment share erosion. But

this will create other issues." C.A. App. 2536 (USTC Strategic Plan). Specifically, USTC feared that if it reduced prices its shareholders would flee the stock as shareholders had fled Phillip Morris when it had embarked on a price war (and produced a dramatic decline in its stock price that became known as "Marlboro Friday"). *See id.* at 2535. USTC thus decided not to compete on price. On quality, too, USTC offered nothing new. Its president testified that USTC did not make a single product improvement of any kind, or provide any additional value to the consumer, in the 10 years preceding trial. *Id.* at 875.

Rather than compete on the merits, USTC decided to exercise its "market power" and "[p]rotect [its] market share by creating barriers to competition." *Id.* at 2492 (Steering Committee Outline). *See id.* at 2499 ("UST does not 'deal' on its product's prices, we don't have to."). USTC's senior executives chose to embark on a multifaceted campaign "to exclude competition from the moist snuff market." Pet. App. 22a.

Legal restrictions severely limit the opportunities for tobacco companies to advertise their products. Accordingly, USTC focused its exclusionary efforts on the point of sale, where moist snuff manufacturers can advertise their wares and alert customers to new product introductions and price promotions. Normally, each manufacturer is allowed by the retail store to place its own rack, with its own "header card" advertising affixed, and gravity-fed slots (called "facings") from which consumers can select a can. "[T]he point at which the buyer makes his purchase decision is the optimal time to convince the buyer to purchase a particular brand of moist snuff." *Id.* at 5a. If the manufacturer is unable to advertise or display its products and price promotions on a rack at the point of sale, it loses the opportunity to compete for the customer's business. *See id.* at 5a-6a.

USTC accordingly used its market power in a number of inter-dependent ways to exclude from stores its competitors' display racks, "point of sale" ("POS") advertising,

and products. For example, USTC sales representatives, while making their sales rounds, "would routinely discard hundreds of thousands of Conwood racks and their accompanying POS." *Id.* at 12a. Conwood's Chairman, William Rosson, testified that Conwood "spent $100,000 a month on replacement racks," *id.*, which represented some 20,000 racks per month. "[A]bout 50 percent of sales representatives' staff time was spent repairing racks destroyed by USTC representatives. Because two to three months would sometimes pass before a sales representative could return to the same store, Conwood lost sales even when it was able to restore racks." *Id.* at 13a. Numerous USTC witnesses admitted that "they removed racks and POS materials without retailer authorization." *Id.* at 15a.

USTC also established a so-called Consumer Alliance Program ("CAP"), which provided inducements for retailers to exclude rival racks, advertising, and products. USTC itself described CAP as "a great incentive . . . for the elimination of competitive products." C.A. App. 2620. "USTC was able to sign 37,000 retailers to the CAP, which represents 80 percent of its overall volume in moist snuff sales." Pet. App. 12a. With more than 21,000 of the most significant retailers, moreover, USTC had express "exclusive vending" contracts that prevented those stores from having any competitors' display racks or POS advertising. C.A. App. 1273-74.

USTC's monopoly power also made it the only plausible candidate to serve in the role of "category manager" for moist snuff. In this capacity, USTC had substantial control over how retailers used store space to display moist snuff and hence USTC could determine whether and how the different brands of moist snuff were displayed. Pet. App. 10a-11a. There was ample space in stores for the small, but highly profitable moist snuff cans; indeed, stores had ample room to stock, and did stock, the far bulkier and less profitable packs of loose leaf tobacco sold by Conwood and others (but not USTC). But USTC

abused its market power by artificially constraining space available to rival moist snuff and by "deliberately provid[ing] false information to stores to exclude competitors from the market." *Id.* at 8a.[1] In particular, USTC sought to "control the number of Price Value product introductions," C.A. App. 2486, and "control the merchandising and the P.O.S. placements, which will make the consumer awareness of the price differential difficult," *id.* at 2656. For USTC, it was "imperative that we continue with this [c]ategory [m]anagement action plan to eliminate competitive products." *Id.* at 2561.

USTC's high-level corporate documents confirmed that USTC planned to "eliminat[e] competitive distribution" through systematic removal of competitors' racks, POS, and facings; implemented that plan through its sales force; monitored progress through periodic reviews of market conditions and annual reviews of salesmen; and tabulated success throughout the United States. Conwood C.A. Br. 17-18 (citing 55 trial exhibits); *see also* Pet. App. 26a (noting that "[m]uch of the evidence Conwood highlights was documentary").

At trial, USTC did not attempt to defend any of these tactics as demand-enhancing or otherwise procompetitive. USTC senior executives readily admitted that there was no shortage of shelf space in the stores and that under ordinary competitive conditions each manufacturer would be permitted to place its own racks and POS advertising in the stores. The executives also admitted that excluding – or inducing stores to exclude – another competitor's products, racks, or POS would be wrong and harmful to competition. *See, e.g.*, C.A. App. 381-85, 392-95, 403-04, 858-59, 879-80, 968. USTC's executives in-

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[1] *See, e.g.*, C.A. App. 2189 (USTC training document showing how to create false impression about rival sales); *id.* at 703 (testimony that USTC sought to constrain space for competitors' products even though there was room for multiple racks); *id.* at 745 (testimony that USTC sought to control a greater percentage of facings to exclude rival products, even though USTC had "plenty of room" to sell its products).

stead claimed that the company did not engage in the types of conduct alleged by Conwood, and that stores excluded Conwood without any prompting from USTC. *See, e.g., id.* at 84-85, 904-06. The jury found otherwise.

The jury also found that USTC's exclusionary conduct harmed competition by leading to higher prices and fewer choices for consumers. Pet. App. 11a (citing evidence "that USTC's conduct harmed consumers by limiting variety and raising prices"); *id.* (citing regression analysis demonstrating that, "for every 10 percent increase in USTC facings, retail prices for moist snuff rose by $.07"); C.A. App. 2762-63 (chart showing that moist snuff output declined where USTC was able to eliminate rival POS advertising and facings).

The district court heard evidence on Conwood's damages from several different sources. Conwood's national sales manager, Terry Williams, compared the markets where USTC had rack exclusivity, which produced a market share for Conwood "below its national average," with markets where it did not have such exclusivity. Pet. App. 43a. The evidence showed that, "in unimpeded competition, Conwood's market share would have been approximately 25 percent instead of 13.5 percent nationally." *Id.* at 16a. This evidence was confirmed by a number of USTC's own witnesses, who testified that in their sales regions, where Conwood's racks and advertising had not been excluded, Conwood's share was around 25 percent. *See, e.g.*, C.A. App. 1787, 1795-97, 1874, 1995.

Conwood's Chairman William Rosson testified that, "had Conwood not been subjected to USTC tactics, it would have had a national market share of approximately 22 to 23 percent." Pet. App. 15a. This testimony was supported by uncontested evidence that Conwood had rapidly gained market share before USTC began its exclusionary campaign; its approximately 40-percent market share in the most closely related market – loose leaf – where USTC did not offer a product; and by Conwood's performance in moist snuff markets where USTC's tactics

were less effective. It was undisputed that "each additional point (one percent) of market share translates into approximately $10 million in annual profits." *Id.* Thus, testimony that Conwood lost 10 percent in national market share supported damages, for the four years preceding trial, of approximately $400 million in lost profits.

Rosson also testified that he had long noted a pattern in Conwood's growth: "[i]n places where [Conwood] had a 'foothold,' i.e., a relatively high market share in a given area, it saw its market share increase during the 1990s to a market share above 20 percent." *Id.* In places where Conwood did not have a foothold market share – a share large enough to ensure that customers would complain of Conwood's exclusion and retailers would have incentive to resist – USTC's tactics prevented Conwood from increasing its market share.

Professor Richard Leftwich of the University of Chicago Graduate School of Business, "who is recognized as an expert on business valuation and lost profits," "tested Rosson's hypothesis." *Id.* at 16a. "Using a regression analysis, Leftwich found a statistically significant difference between states in which Conwood had a foothold and those in which it did not." *Id.* Leftwich first determined that, "in states where Conwood had a market share in 1990 of 20 percent or more, the market share grew on average an additional 8.1 percent from 1990 to 1997." *Id.* "'In contrast, in states where Conwood had a lower market share, the regression predicts that its share would grow very little.'" *Id.* at 16a-17a (quoting district court decision). Leftwich then "considered other factors to rule out the possibility that [the] statistical relationship [he found] was caused by factors other than USTC's conduct." C.A. App. 88 (district court motion in limine opinion). Leftwich examined all possible alternative explanations for which data were available, including every possibility that USTC's expert suggested, and found that no other factor besides USTC's exclusionary conduct could explain

Conwood's stunted growth in non-foothold states. *Id.* at 1104, 1111.

Leftwich accordingly determined that Conwood's low market growth was due to USTC's exclusionary conduct and that "increases in USTC's exclusionary behavior in a state reduced Conwood's share of sales by a statistically significant amount." Pet. App. 17a. Leftwich assessed Conwood's damages from USTC's actions to be in a range from $313 million to $488 million. *Id.* USTC offered no evidence on the amount of Conwood's damages and claimed only that Conwood had sustained no damages. The jury awarded damages of $350 million. *Id.* After statutory trebling, the court entered judgment for Conwood in the amount of $1.05 billion. *Id.* at 48a.

3. On appeal, "USTC d[id] not challenge that it has monopoly power; nor [wa]s there an issue as to the relevant product (moist snuff) and geographic markets (nationwide)." *Id.* at 21a. USTC abandoned its "we didn't do it" defense, arguing instead that "the evidence presented at trial amounted to no more than 'insignificant' tortious behavior and acts of ordinary marketing services." *Id.* at 18a. USTC also argued that the district court abused its discretion by admitting testimony concerning Conwood's damages. *See id.* at 36a. The court of appeals affirmed.

a. Quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985), the court explained that, "'[i]f a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory [or exclusionary].'" Pet. App. 21a. Applying that standard to the evidence adduced at trial, the court found "ample documentary and testimonial evidence" to support the jury's verdict that "USTC's pervasive practice of destroying Conwood's racks and POS materials and reducing the number of Conwood facings through exclusive agreements with and misrepresentations to retailers was exclusionary conduct without a sufficient justification, and that USTC maintained its monopoly power by engaging in such conduct." *Id.* at 30a.

The court first rejected USTC's claim that its acts were "isolated sporadic torts" that did not rise to the level of antitrust violations. *Id.* at 22a-23a. The court noted that USTC itself conceded that tortious activity can form the basis for liability under the Sherman Act as long as "that activity is pervasive and accompanied by other anti-competitive conduct." *Id.* at 18a. The court recited the extensive trial evidence and concluded that, "[c]onstruing the evidence in the light most favorable to Conwood, these incidents were neither sporadic nor isolated." *Id.* at 25a.

The court also rejected USTC's contention that retailers "alone, not USTC, determined and controlled what racks and POS were used in their stores." *Id.* at 26a. The court cited extensive evidence (including USTC's own documents) to support Conwood's allegation that USTC abused its power with retailers, as the monopoly provider of moist snuff, "to control the number of price value brands introduced in stores" (*id.*) and "to place USTC racks exclusively in retail stores and hide competitor products in its racks" (*id.* at 29a). USTC also made outright "misrepresentations to retailers to obtain exclusive vending" (*id.* at 29a-30a), and entered into tens of thousands of contracts that required retailers to eliminate space and advertising for rivals' products (*id.* at 12a).

The court further rejected USTC's complaint that the district court had erred in permitting the jury to consider legal conduct as commingled with illegal conduct: the court noted that "the district court properly instructed the jury that USTC could not be held liable for conduct that was part of the normal competitive process." *Id.* at 28a n.4 (citing *Aspen Skiing*, 472 U.S. at 604-05).

Finally, the court recited the testimony of USTC's Chairman Vincent Gierer, who acknowledged in cross-examination that his company had endorsed a "strategy of eliminating competitive distribution," which earlier in his testimony he had conceded was "not a legitimate goal." *Id.* at 29a. As the court summarized it, "Gierer essentially admitted that the activities about which Conwood

complains, particularly the misrepresentations to retailers to obtain exclusive vending, was not competitive conduct spurred by efficiency. Moreover, USTC has failed to offer any valid business reason for its representatives' pervasive destruction of Conwood racks." *Id.* at 29a-30a. Having found "ample" evidence of exclusionary conduct without any attempt to defend that conduct as efficient, the court upheld the verdict. *Id.* at 30a.

b. The court next rejected USTC's claim that Conwood had failed to prove harm to competition in the national moist snuff sales market. Citing the testimony of Professor Kamien, the court of appeals noted that, "as a result of USTC's exclusionary conduct, the consumer suffered by having to pay higher prices, and that there was less variety in the market." *Id.* at 33a. Kamien further testified that, "had there been true competition in the moist snuff market, USTC's market share, which dropped approximately 1 percent per year between 1979 and 1990, would have fallen much faster." *Id.* at 34a.

c. The court rejected USTC's contention that the district court had abused its discretion in allowing Professor Leftwich to testify on damages under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The court noted that USTC did "not challenge Leftwich's qualifications as an expert, but only his testimony and damages study." Pet. App. 38a. The court then reviewed the *Daubert* factors to determine the reliability and relevancy of Leftwich's analysis. *Id.* at 38a-39a.

The court pointed out that Leftwich had used three methods to test Conwood's claims: a regression analysis, a yardstick test, and a before-and-after test. Those modes of analysis "are generally accepted methods for proving antitrust damages." *Id.* at 40a. The court rejected USTC's complaint that Leftwich had "failed to take into account any USTC 'bad act.'" *Id.* at 41a. Contrary to USTC's submission, Leftwich had taken "USTC's expert's own regression model" and used information from "sworn affidavits compiled from 241 Conwood sales representa-

tives detailing USTC's unethical activity in their areas" to construct "three alternate measures of USTC's bad acts by state." *Id.* The court concluded that Leftwich's regression analysis "accounted for all variables raised by USTC's own expert." *Id.* at 42a.

The court found no merit in USTC's objections to Rosson's damages testimony and to Leftwich's study on the grounds that they were too speculative and unlinked to the evidence of wrongdoing. The court noted that "[t]he jury was instructed that it could not award damages for injuries caused by other factors" and that "it is undisputed that USTC did not object to the jury instructions regarding damages." *Id.* The court thus "reject[ed] USTC's argument that Conwood failed to disaggregate the injury caused by USTC as opposed to that caused by other factors." *Id.* at 42a-43a. Accordingly, the court concluded that "there was sufficient evidence to support the jury's award of damages in this case" and that the jury's award was "well within th[e] range" of the $313-$488 million estimated by Conwood's witnesses. *Id.* at 43a.

USTC's petition for rehearing and rehearing en banc was denied. *Id.* at 45a. No judge voted in favor of rehearing or even requested a response.

REASONS FOR DENYING THE PETITION

I. USTC's admitted failure to object to the jury instructions leaves it with only a sufficiency-of-the-evidence challenge. In rejecting that challenge, the court below faithfully applied this Court's well-settled antitrust principles to the facts presented. The court carefully scrutinized a voluminous trial record and found "ample" evidence of USTC's extensive campaign of exclusionary conduct. That fact-bound determination does not conflict with any other court decision.

II. The court of appeals also properly concluded that the damages award comported with well-established antitrust and evidentiary standards. The unchallenged jury instructions required the jury not to award damages for lawful conduct. USTC's argument that the evidence was

insufficient to support a conclusion that the jury could have segregated lawful from unlawful conduct was carefully considered and rejected by the court below. In this Court, USTC largely repeats its attack on Conwood's expert without acknowledging – as the court of appeals pointed out – either that Conwood's expert performed the very analysis that USTC insists was necessary or that there was ample additional evidence (unchallenged by USTC) that supported the jury's award. USTC's fact-bound challenge presents no circuit conflict.

I. USTC'S SUFFICIENCY CHALLENGE WAS CORRECTLY REJECTED BY THE SIXTH CIRCUIT, WHICH APPLIED WELL-SETTLED PRINCIPLES OF ANTITRUST LAW TO THE EVIDENCE

USTC frames its first question as whether "misleading 'suggestions' and 'recommendations' to retailers" may be a basis for antitrust liability. Pet. i. But USTC does not dispute that there was extensive evidence of USTC's outright exclusion of its competitors' products and advertising. Nor does USTC suggest that *this* evidence was insufficient to support the verdict. Moreover, USTC did not object to the admission of evidence regarding its false and misleading statements to stores, and did not request a jury instruction or special verdict on this issue. Accordingly, USTC is left to argue that *part* of the trial evidence was insufficient to support the verdict. That argument falls of its own weight. *Aspen Skiing*, 472 U.S. at 604 (Court "must interpret *the entire record* in the light most favorable" to the prevailing party) (emphasis added). In any event, USTC is wrong to suggest that its fraudulent conduct – which it admitted served no legitimate purpose – was *per se* lawful, or that any court has so held.

A. The Properly Instructed Jury's Finding Of Exclusionary Conduct Was Based On Overwhelming Evidence

USTC concedes that the jury was correctly instructed under this Court's holdings that exclusionary conduct is "conduct that has the effect of preventing or excluding

competition or frustrating or impairing the efforts of other firms to compete for customers." C.A. App. 235 (Jury Instruction No. 2.4). The district court also properly instructed the jury that USTC could not be held liable simply for "supplying better products or services," or for conduct that "is part of the normal competitive process." *Id.* In reviewing the judgment at trial, the court of appeals expressly followed this Court's direction to "assume that the jury followed the court's instructions." *Aspen Skiing*, 472 U.S. at 604; *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 243 (1993).

As the court below correctly held, ample evidence supported the jury's finding that USTC impaired the opportunities of rivals and prevented competition on the merits. Representative statistics from the trial are illuminating:

– 122 representative USTC documents, many from senior executives, instructed USTC representatives in the field to prevent rival distribution and promotion, and monitored the success of the plan as it was implemented;

– 74 USTC sales representatives admitted in either testimony or trial exhibits that USTC had ordered them to choke rival distribution and promotion as a matter of corporate policy, and that they had followed that policy, often by simply removing competitors' products and displays from the stores;

– 600 specific and representative instances of exclusion from 22 states were admitted into evidence;

– Conwood was required, as a result of USTC's campaign, to replace 20,000 moist snuff sales racks *per month* after 1990 at a cost of $1.2 million annually;

– Conwood's more than 200 salespersons were required to spend *half* their work time attempting to restore Conwood racks, POS advertising, and products after USTC had excluded them from the stores;

– Conwood's presence in stores (measured by the number of slots or "facings" occupied by Conwood products)

was reduced on average from 7 facings to only 2 after a USTC representative visited a retail outlet;

– At least 21,000 retailers, including the nation's most significant chain outlets for moist snuff, were covered by USTC contracts that explicitly required exclusion of competitors' racks/POS/products; and

– At least 37,000 retailers, representing 80 percent of USTC's U.S. moist snuff sales, were covered by USTC contracts with features preventing free competition.[2]

That evidence proved USTC's direct exclusion of rivals' racks, products, and advertising, not just "misleading 'suggestions' and 'recommendations' to retailers." Pet. i.

In this Court, USTC contends that the evidence revealed only "legitimate business conduct" consisting of "aggressive nonprice competition that is integral to the everyday competitive process." Pet. 2. But at trial USTC never even attempted to offer "valid business reasons" for any facet of the exclusionary conduct challenged by Conwood, including its misrepresentations to retailers. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483 (1992). *See also Aspen Skiing*, 472 U.S. at 605, 608-09 (excluding rivals on basis other than efficiency is anticompetitive). To the contrary, USTC "essentially admitted that the activities about which Conwood complains, *particularly the misrepresentations to retailers to obtain exclusive vending*, was not competitive conduct spurred by efficiency." Pet. App. 29a-30a (emphasis added). *See also* p. 5, *supra* (collecting cites). Confronted

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[2] This summary, contained with citations in Conwood's court of appeals brief (at 37-38), was captured in great part by the court of appeals' opinion. *See* Pet. App. 6a-15a. Yet even the court's opinion, rich as it is in reflecting the record in this case, necessarily only references a small part of the evidence presented during a month-long trial. Under the *Aspen Skiing* standard, this Court would be required to review the entire trial record – 6313 pages of testimony and 364 documentary exhibits – and satisfy itself that no reasonable trier of fact could have found USTC's conduct to violate Section 2 before it could reverse the court of appeals in upholding the district court's judgment for Conwood. *See Aspen Skiing*, 472 U.S. at 604.

by the evidence at trial, USTC simply denied that it had committed the acts that Conwood alleged to be illegal. The case was accordingly contested at trial on that basis, and USTC lost. It cannot now attempt to retry its case in this Court, based on an efficiency defense that it never asserted below.[3]

In any event, that defense has no merit. The court of appeals canvassed the evidence detailing the wide range of USTC's anticompetitive acts: entering into agreements that required stores to exclude competition; training its personnel to destroy or remove Conwood's products; misusing its position as category manager to exclude Conwood's advertising and racks and reduce its product facings; and misleading stores as part of an effort to gain their support for such exclusion. Pet. App. 23a-30a. The court correctly characterized that evidence as presenting "a systematic effort to exclude competition from the moist snuff market," and as sufficient to show that "USTC sought to achieve its goals of excluding competition and competitors' products by numerous avenues." *Id.* at 22a.

"It is not customary for this Court to review the sufficiency of the evidence." *Brooke Group*, 509 U.S. at 230. There is certainly no reason to do so here, where USTC does not even attempt to dispute that the record as a whole provides sufficient evidence of exclusionary conduct, and where USTC never even attempted to offer "valid business reasons" for any facet of that conduct. *Eastman Kodak*, 504 U.S. at 483.

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[3] Even USTC does not seek to offer any business justification for the pervasive and unauthorized rack removals. Instead, USTC suggests that the Court need not address the anticompetitive effect of those "simple torts" because they were improperly aggregated by the court of appeals with "procompetitive conduct." Pet. 18 n.11. But, as noted, USTC never objected to evidence of any of the conduct that it now strives to label as pro-competitive, never sought to present a business justification for that conduct, and never requested a jury instruction or special verdict on this issue. Accordingly, the exclusionary effect of all that conduct was properly considered by the courts below.

B. The Decision Below Does Not Conflict With Decisions Of Any Other Circuit

USTC asserts that the Sixth Circuit's holding on sufficiency of the evidence conflicts with the decisions of other circuits in two respects: (1) the standards for "nonprice competition" (Pet. 15-19), and (2) the requisite degree of "foreclosure" to support a Section 2 violation (Pet. 19-20). Particularly when viewed through the lens of USTC's failure to challenge the jury instructions and thus preserve an argument that the law requires something more than the existing settled standards under Section 2, the claims of "conflicts" are without foundation.

1. USTC asserts (Pet. 16) that this Court's guidance is needed because of an alleged conflict between the decision below regarding "nonprice competition" and "the analysis" of *Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999). But USTC did not challenge the jury instructions on this issue and thus cannot complain that the jury was wrongly instructed on the law. The court below simply decided that extensive evidence supported the jury's finding that USTC engaged in exclusionary conduct, based on the many witnesses and exhibits that demonstrated how USTC used its power in myriad ways to exclude its competitors' racks, POS advertising, and products, and because USTC had offered no procompetitive justification for *any* of the conduct challenged by Conwood. The Sixth Circuit found no contrary rule of law in *Stearns*, and there is none.

In *Stearns*, the court did not review for sufficiency an extensive trial record documenting varied forms of misconduct that the monopolist did not even attempt to justify. The Fifth Circuit considered, instead, a grant of summary judgment (for defendant manufacturer of airplane-to-airport gate bridges) where the defendant had allegedly misled airport buyers as part of a bidding competition with the plaintiff. The plaintiff's evidence all involved "fairly simple attempts [by the defendant] to generate sales by 'touting the virtues' of its bridges." 170

F.3d at 524. *That* conduct, alone, was insufficient as a matter of law for Section 2 liability, the Fifth Circuit held, because even a monopolist can attempt to sell its own products to customers "by vigorously stressing the qualitative merits of its product." *Id.* at 526.

Nothing of the sort is at issue here. Rather than stress the merits of its products, USTC abused its power to prevent others from having the chance to sell theirs. As its executives testified, USTC already had ample room to sell, display, and "tout the virtues" of its own products in stores. C.A. App. 703-04, 941-43, 961, 1592-94. The conduct challenged at trial was not conduct claimed by the monopolist, as in *Stearns*, to be rational, pro-competitive efforts to convince the customer to take its products over the plaintiff's. Nor was it, as USTC now wishes to pretend, mere "recommendations" or "suggestions" as to what stores should do. The evidence showed that USTC itself excluded competitors' racks, POS, and products, and that it either coerced or misled retailers into going along with that exclusion. USTC defended against that evidence by denying that it had engaged in such exclusion; but it freely admitted that this conduct had no legitimate purpose. Pet. App. 29a-30a. Accordingly, the extensive record before the Sixth Circuit was almost the exact opposite of the narrow issue addressed by the Fifth Circuit on review of summary judgment in *Stearns*. Both courts, moreover, reached their conclusions by applying the same standards from *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), and *Aspen Skiing*. *Compare* 170 F.3d at 522-23 *with* Pet. App. 19a-20a.[4]

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[4] USTC is also incorrect (Pet. 17) in asserting a conflict with decisions of the Seventh and Eighth Circuits. Those decisions do not even address "nonprice competition" under Section 2. For example, in *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir.), *cert. denied*, 531 U.S. 979 (2000), the court rejected a claim that price discounting violated antitrust laws because, "[i]n the absence of predatory prices, any losses caused by pricing 'cannot be said to stem from an *anticompetitive* aspect of the defendant's conduct.'" *Id.* at 1061 (footnote omitted). As the court there stressed, "[a] Section 2 defendant's

Nor should this Court depart from its normal certiorari standards to consider USTC's generalized complaint (Pet. 18) that the Sixth Circuit's ruling provides "no standard to guide courts or competing firms on the boundary between lawful competition and illegal exclusionary conduct or the criteria that should be applied in evaluating the dominant firm's marketplace conduct." The jury instructions derived directly from this Court's cases and were accepted by USTC as properly stating the law applicable to this case. USTC did not seek any additional "guidance" for the jury on the line between lawful competition and illegal exclusionary conduct. Nor can USTC plausibly claim any uncertainty by the jury, where it freely admitted that all of the conduct about which Conwood complained – including "misrepresentations to retailers to obtain exclusive vending" as well as the removal of racks, POS, and products – was illegitimate and should not have occurred. Pet. App. 29a-30a. In light of USTC's failure to object to the jury instructions, and its admissions that the alleged conduct had no competitive justification, this case

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proffered business justification is the most important factor in determining whether its challenged conduct is not competition on the merits." *Id.* at 1062. The manufacturer's justification for cutting prices in *Concord Boat* – to increase sales of its products – thus contrasts markedly with USTC's unjustified and multi-faceted nonprice campaign, which was designed to prevent competitors from selling *their* products and in particular to prevent price competition from half-priced brands.

Likewise, there is no conflict (*see* Pet. 17) with *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Association*, 672 F.2d 1280, 1288 (7th Cir. 1982), a Sherman Act Section 1 case in which an automobile dealer complained that a local dealer's association refused to admit it as a member. The court rejected the plaintiff's claim because the "plaintiff has made no showing that membership in the defendant Association is necessary (or even desirable) to compete effectively as a Datsun dealer." *Id.* at 1286. And, in *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) (Breyer, J.) (*see* Pet. 16 n.8), the court rejected a claim that price discounts and noncancellation clauses with "legitimate business considerations" were anticompetitive means of maintaining monopoly power. 724 F.2d at 236.

could not serve as a vehicle for any general exploration of the line between lawful and unlawful nonprice conduct.[5]

2. USTC asserts (Pet. 19) that the court below "relieve[s] plaintiff of any foreclosure requirement" and thus supposedly conflicts with the decisions of four circuits. That contention, however, ignores that USTC sought no jury instruction on its current foreclosure theory, and thus cannot now complain that the jury was not asked to find that a particular percentage of the moist snuff market was foreclosed to competition. *See* Fed. R. Civ. P. 51 ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.").

Nor, in any event, is USTC's view the law. The Sixth Circuit invoked *Aspen Skiing* to explain that, "whether conduct may be characterized as exclusionary, 'it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.'" Pet. App. 21a (quoting 472 U.S. at 605). The jury here was instructed to consider the impact of USTC's campaign on competition and consumer choice. As the court of appeals explained, the evidence not only showed that USTC engaged in "exclusionary conduct without a

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[5] While taking no position on whether USTC engaged in exclusionary conduct in violation of Section 2, *amicus* American Wholesale Marketers Association asks the Court to grant the petition to explain "what trade practices shall be acceptable, reasonable, and appropriate in the convenience store chain of trade" (Br. 2). But (1) this Court does not give advisory opinions; (2) AWMA's suggestion that the Sixth Circuit has called into question such common practices as the use of racks, point-of-sale advertising, category managers, and promotional allowances is blatantly incorrect (*see, e.g.*, Pet. App. 28a); and (3) AWMA fails to recognize the well-accepted principle that a monopolist exercising market power to exclude competitors without competitive justification may be held liable under Section 2 when a non-monopolist engaged in similar conduct could not. *See United States v. Microsoft Corp.*, 253 F.3d 34, 57-58, 72 (D.C. Cir.) (en banc) (per curiam), *cert. denied*, 122 S. Ct. 350 (2001).

sufficient justification," it also demonstrated that "USTC maintained its monopoly power by engaging in such conduct." *Id.* at 30a. USTC does not challenge the jury's finding on that point, which itself was supported by substantial evidence. *Id.* at 33a (citing evidence that USTC's conduct harmed consumers by limiting variety and raising prices). *See also* pp. 4-6, *supra* (citing record sources).

The cases cited by USTC do not establish a foreclosure requirement under Section 2. Curiously, USTC cites *United States v. Microsoft Corp.* But there the D.C. Circuit *rejected* a specific foreclosure threshold. The court explained that a Section 2 violation does not require proof of any particular percentage of foreclosure, but rather that "the monopolist's conduct indeed has the requisite anticompetitive effect." 253 F.3d at 58-59 (citing *Brooke Group*, 509 U.S. at 225-26). *Cf.* Pet. App. 33a (discussing *Brooke Group* in context of exclusionary effects in growing market). It then upheld a claim for monopoly maintenance where the monopolist had engaged in a wide range of anticompetitive acts even though the government could not establish what direct effect any of those acts individually had on foreclosing competition but where the sum total of Microsoft's anticompetitive campaign maintained its monopoly power.[6]

Similarly, in *Barry Wright*, the court upheld a district court's judgment for the defendant, finding that the evidence presented did not establish "exclusion" from contracts that required a manufacturer to sell its products at a specially low price in exchange for the buyer's agree-

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[6] In the passage cited by USTC, the court explicitly rejected the claim that the "roughly 40% or 50% share usually required to establish a § 1 violation" based on the "monopolist's use of exclusive contracts" was necessary to "give rise to a § 2 violation." 253 F.3d at 70. Here, in any event, the evidence supported a finding that USTC had contracts that alone – and without reference to the other forms of misconduct proved at trial – prohibited fair competition with retailers accounting for 80 percent of its sales (Pet. App. 12a), which in turn consists of 61.6 percent of the U.S. moist snuff market. Thus, even by Section 1 standards, substantial foreclosure was established. 253 F.3d at 70.

ment to take nearly all of its requirements from that seller. 724 F.2d at 236-37. In rejecting a competitor's Section 2 claim, the court explained that the evidence did not establish "the severity of the foreclosure (a fact which, other things being equal, suggests anticompetitive harm)." *Id.* at 237. Thus, in *Barry Wright*, "severity of foreclosure" was simply an evidentiary factor in establishing whether the monopolist had engaged in anticompetitive conduct – it was not a stand-alone requirement for a Section 2 violation, as USTC appears to assert (Pet. 20). And, even if that *is* what the First Circuit intended, USTC failed to preserve this argument through an objection to the jury instructions. *See* Pet. App. 53a-54a.

Nor is the decision below in conflict with *Concord Boat* (207 F.3d at 1044-45). That court held that the alleged predatory conduct was legitimate price competition that helped consumers and that the defendant monopolist did nothing to prevent the plaintiff from offering a better deal. The court further noted that the challenged agreements did not even require exclusive dealings with the monopolist, but rather permitted purchasers to buy up to 40 percent of their requirements from other sellers without forgoing the discount offered by the monopolist. On those facts – without even looking at the share of the total market covered by those agreements – the Eighth Circuit found no exclusion, a factual conclusion that does not conflict in any way with the Sixth Circuit's affirmance of the district court in this case. *See, e.g., United States v. Doe*, 465 U.S. 605, 614 (1984) ("Traditionally, we . . . have been reluctant to disturb findings of fact in which two courts below have concurred.").[7]

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[7] USTC's reliance (Pet. 20) on *Western Parcel Express v. United Parcel Service of America, Inc.*, 190 F.3d 974, 976 (9th Cir. 1999), is also misplaced. That case concerned whether the defendant had market power (*see id.* at 975) – an issue uncontested by USTC in this case.

II. USTC'S SUFFICIENCY CHALLENGE TO THE DAMAGES EVIDENCE LACKS MERIT AND RAISES NO CONFLICT WITH ANY CIRCUIT

A. USTC Has Failed To Preserve Any Legal Issue Regarding Damages For The Court To Review

In the court of appeals, USTC contended that the district court had erred under *Daubert* by admitting the testimony of Conwood's damages expert, Professor Richard Leftwich. In this Court, USTC has abandoned its challenge to the lower courts' application of *Daubert*, thus conceding that Leftwich's testimony was properly admitted. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 534-38 (1992) (questions not framed in the petition for writ of certiorari are deemed waived).

Instead USTC complains, first, that Conwood failed to "disaggregate" legal from illegal conduct in its proof of damages and, second, that Conwood failed to "link" its antitrust damages to specific antitrust misconduct.

On the first issue, USTC fails to acknowledge that the jury in this case was specifically instructed to separate lawful from unlawful conduct in calculating damages: "[y]ou may not . . . calculate damages based only on speculation or guesswork, and you must remember that you can award Conwood damages only for injuries caused by a violation of the antitrust laws. You may not award damages for injuries or losses caused by other factors." C.A. App. 243 (Jury Instruction No. 4). As the Sixth Circuit recognized, a reviewing court "must assume that the jury followed the court's instructions." *Aspen Skiing*, 472 U.S. at 604. The jury must, therefore, be presumed to have "disaggregate[d] the injury caused by USTC as opposed to that caused by other factors." Pet. App. 42a-43a.

To the extent USTC suggests that the instruction given to the jury was insufficient and some additional legal instruction should have been given, that argument was not presented to the district court at trial and is, thus, waived. *E.g., Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 573 (1990) (any "possible flaw in the jury's calculation of the

amount of damages would not be an appropriate basis for" overturning verdict in absence of challenge to jury instructions). It is also incorrect. The damages instruction given by the district court was perfectly in keeping with the damages requirements imposed by this Court in other antitrust cases.[8]

On the second issue, USTC asked for no instruction requiring the jury to trace each dollar of antitrust damages to specific instances of antitrust misconduct. Nor could it have; USTC cites not a single case in which a court has accepted such a requirement, much less a dispute about this in the lower courts. USTC cannot ask for review in the Court based on an instruction it did not request and could not properly have gotten.

B. Overwhelming Evidence Supported The Properly Instructed Jury's Damages Award

Because USTC failed to preserve any legal issue concerning the jury instructions (or the admissibility of any damages evidence), the only possible issue before this Court is whether all the evidence, viewed in the light most favorable to Conwood, was sufficient to support the jury's finding. But this Court's cases make absolutely clear that it does not sit to review the sufficiency of the evidence. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). In particular, the Court has stressed that evidence on antitrust damages should not be reweighed on appeal. *Texaco*, 496 U.S. at 573.

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[8] *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) ("[i]t is enough that the illegality is shown to be a material cause of the injury"); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) (noting the "well settled principle" that, "in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs").

In any event, USTC does not even purport to confront *all* the record evidence on damages. USTC criticizes Leftwich's testimony, but it does not contest the other evidence on damages. Moreover, USTC mischaracterizes Leftwich's testimony. As the court of appeals found, Leftwich did carefully rule out causes of Conwood's damages other than USTC's exclusionary conduct. While USTC finds that testimony unpersuasive, the question was properly submitted to a jury, which found the testimony credible.

1. USTC's petition directs its fire on disaggregation solely at the economic study performed by Professor Leftwich. USTC simply ignores (Pet. 21-23) the *other* witnesses on damages, whose testimony the Sixth Circuit found independently sufficient to support the jury verdict. Pet. App. 42a-44a. In "reject[ing] USTC's argument that Conwood failed to disaggregate the injury caused by USTC as opposed to that caused by other factors," *id.* at 43a, the court found that three different witnesses placed the damages range between $313 million and $488 million for the multi-year period in which USTC's illegal campaign harmed Conwood, *id.* at 43a-44a.

As previously explained (pp. 6-8, *supra*), the jury heard evidence from two Conwood executives, each with decades of experience in the smokeless tobacco market, who testified that, absent USTC's unlawful campaign, Conwood's market share would have been in the mid-20s. Pet. App. 15a-16a, 42a-43a. That testimony was based not only on their experience, but also on Conwood's market share growth in the years before USTC commenced its violations, Conwood's performance in the most closely analogous market (loose leaf), and Conwood's performance in local areas where it had a significant presence before USTC began its campaign to exclude. *Id.* This testimony was supported by USTC's own witnesses, who testified that in their sales regions, where Conwood's racks and advertising were not excluded, Conwood's share was around 25 percent. C.A. App. 1787, 1796-97, 1874, 4809.

Based on the undisputed figure of $10 million per market share point in additional profit, *see* Pet. App. 15a, this evidence supported Conwood's claim to at least $400 million in lost profits in the four years preceding trial arising solely from USTC's challenged anticompetitive conduct.

2. Even if USTC could view Professor Leftwich's evidence in isolation, his study plainly did disaggregate lawful from unlawful conduct. Using accepted statistical methods, Leftwich tested Conwood's assertion that its growth had been stymied by USTC in states where it had not established a foothold before USTC began its exclusionary campaign. Leftwich testified that there was a statistically significant difference between Conwood's growth after 1990 (when USTC began its campaign) in foothold and non-foothold states, and that Conwood's diminished growth could not be explained by any factor *except* USTC's challenged anticompetitive conduct.

For example, in his before-and-after test, Leftwich found that, prior to the exclusionary campaign, there was no relationship between Conwood's foothold status and market share growth rate, but that, after USTC's campaign had begun, there *was* a significant relationship between Conwood's share of the moist snuff market in a state and the rate of growth in that state. *Id.* at 41a.

In his yardstick test, Leftwich disproved claims that aggressive competition by USTC, lack of innovation by Conwood, or advertising restrictions caused the growth differential by comparing Conwood's performance in the moist snuff market to its performance in the closely analogous loose leaf tobacco market. Leftwich noted that, in loose leaf, Conwood competed with the same sales force, there was no more or less innovation, and the same advertising constraints applied in precisely the same stores. Yet in the loose leaf market, where USTC did not compete, Conwood was able to achieve market growth in all states, including those where it did not begin with a relatively high share. *Id.* *See also* C.A. App. 1106-08.

In his initial regression analysis, Leftwich considered an array of additional hypotheses for Conwood's stunted growth in non-foothold states and found that none could explain Conwood's losses. *See, e.g.*, C.A. App. 1104-09 (testimony), 3517-28 (expert report), 4412-13 (expert rebuttal report). To confirm further that Conwood's losses were attributable to USTC's unlawful conduct, Leftwich performed an additional regression, based on a model developed by USTC's own expert. Pet. App. 41a. As the Sixth Circuit noted, Leftwich employed nationwide sales data and sworn declarations from 241 Conwood sales representatives regarding the extent and relative intensity of USTC's challenged conduct in their territories and used this information "to construct three alternate measures of USTC's bad acts by state." *Id.* Leftwich found that "increases in UST's exclusionary behavior in a state *reduce* Conwood's share of sales in stores in that state by a statistically significant amount." C.A. App. 4415-16 (expert rebuttal report). The Sixth Circuit thus expressly rejected USTC's complaint that Leftwich had "failed to take into account any USTC 'bad act.'" Pet. App. 41a.

USTC claims that Leftwich calculated damages as one "ball of wax" and accordingly admitted that he swept legal and illegal conduct alike into his opinion. Pet. 23. In fact, Leftwich testified only that all of the *unlawful* conduct went into his calculation, with no attempt to assign specific figures for separate rack removals, contracted exclusions, or other kinds of exclusion. Because his analysis identified USTC exclusionary conduct of all kinds as the only explanation for Conwood's stunted growth in the non-foothold states, Leftwich did limit his damages estimate to the effect of USTC's unlawful conduct. USTC has cited no authority for its claim that Leftwich was required to disaggregate damages due to each species of unlawful conduct, much less each instance of exclusion.

In short, Leftwich considered and ruled out all of the alternative "explanations that USTC's own expert suggested as possible explanations for Conwood's low market

share," Pet. App. 40a-41a, and proved a direct link between increases in USTC's anticompetitive conduct and Conwood's lost share. His testimony was subjected to vigorous cross-examination, yet USTC offered no contrary evidence (other than to present an expert to argue that Conwood had suffered no damages). It was up to the jury to weigh the evidence, and its award of $350 million was consistent with this Court's decisions. *See, e.g., Zenith*, 395 U.S. at 116-19 (evidence as to what market share would have been in the absence of antitrust injury sufficient to sustain verdict); *Bigelow*, 327 U.S. at 264 (comparison of plaintiff's receipts before and after defendant's unlawful actions was sufficient to support jury's verdict).

USTC complains about the imprecision of the proof regarding the substantial damage caused by its unlawful corporate policy of abusing its power to harm competition without ever having offered a better way to calculate damages. Whatever uncertainty might exist in the calculation of damages, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow*, 327 U.S. at 265.[9]

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[9] USTC repeatedly notes the size of the damages award, as if that alone were a ground for certiorari. But "[t]he size of the damages award . . . confirms the substantial character of the effect of" USTC's anticompetitive conduct. *Aspen Skiing*, 472 U.S. at 608. USTC's focus on the amount of the award after trebling is inappropriate. Congress has determined that antitrust awards should be trebled, and an attack on the trebled number is an attack on that statutory policy, not on the jury's assessment of injury. Accordingly, the amount awarded prior to trebling, $350 million, is the amount relevant to USTC's suggested analysis. When viewed from the perspective of 1 percentage point of market share equaling $10 million per year in lost profits, the $350 million awarded is in fact a conservative number (representing the loss of less than 9 market share points over a four-year period preceding trial). Pet. App. 15a. The court below thus reasonably concluded that the jury award was "well within that range" of evidence on damages. *Id.* at 43a. We would also note that USTC itself has characterized the award as "not expected to have a material adverse effect on [USTC's] consolidated financial position." UST Inc. SEC Form 10-Q (3d Qtr. 2002).

C. USTC's Suggestion Of A "Conflict" On Damages Is Incorrect

USTC alleges numerous conflicts on the issue of damages. None is remotely convincing. As an initial matter, most of the cases cited by USTC are *Daubert* cases dealing with the "gatekeeper" function of the court in admitting expert testimony, not with an analysis of the sufficiency of properly admitted evidence. As noted, USTC has waived its *Daubert* challenge in this Court. Moreover, because USTC failed to preserve any legal issue concerning the standard considered by the jury, this case involves only the fact-bound application of undisputed legal principles. USTC cannot identify any controlling legal principle on which the lower courts disagree.

In *Concord Boat*, the expert "construct[ed] a hypothetical market which was not grounded in the economic reality" of the market at issue; assumed that the plaintiffs' products were of the same quality as the defendants' (when they were not); assumed (for no particular reason) that antitrust damages would begin when one firm reached 50 percent; assumed that, in his entirely fictive market, prices would be set in accordance with an academic theory ("Cournot model") that had never been held a valid method for estimating antitrust damages; and, then, from those compounded assumptions – none anchored in the facts – predicted substantial damages. 207 F.3d at 1056. Worse still, the expert's assumptions concededly were contradicted by "inconvenient evidence." *Id.* The expert admitted that he had "failed to account for market events that both sides agreed were not related to any anticompetitive conduct," even though "such facts could have been incorporated into his model." *Id.* Not a single one of those glaring errors can be found in the damages evidence below. Both the Eighth and Sixth Circuits applied the exact same standard to the evidence – in *Concord Boat*, the expert failed to ground his opinion in the facts; in this case, he did. USTC's claimed conflict is therefore illusory.

In *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998), the court specifically noted that the plaintiff made no effort to "segregate damages attributable to lawful competition from damages attributable to Kodak's monopolizing conduct." *Id.* at 1224. Here, the courts below in no way challenged this principle, but simply determined, on this record, that there *was* an adequate basis in the record by which the jury could limit damages to unlawful conduct. Pet. App. 43a. Once again, the courts of appeals are in agreement on the proper standards, and USTC complains only about the fact-bound application of settled law to its case.

The Sixth Circuit's rulings are not at all inconsistent with *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). The Court there concluded that the district court had not abused its discretion in excluding the testimony of experts whose analyses "were so dissimilar to the facts presented in this litigation." *Id.* at 144-45. In this instance, using precisely the same standard of review articulated in *Joiner*, the court of appeals found that the damages testimony was properly tied to the facts of this litigation. Pet. App. 41a-42a.

Nor is there a conflict with Eighth Circuit decisions. In *Blue Dane Simmental Corp. v. American Simmental Association*, 178 F.3d 1035 (8th Cir. 1999), the court held that the district court had not abused its discretion in excluding inherently implausible expert testimony, where the expert declined to consider other concededly relevant factors and attributed the entire reduction in price for Risinger cattle in an already falling market to the introduction of 19 head into a purebred market of 138,169 animals. Here the court of appeals found exactly the opposite: "no reasoned basis" to overturn the district court's admission of Leftwich's testimony. Pet. App. 39a; *see also id.* at 40a-41a. Leftwich was "subject to vigorous cross examination and an opportunity for [USTC] to introduce countervailing evidence of its own." *Id.* at 42a. USTC

simply does not like the results of that process. There is no basis for USTC's assertion that this issue would have been decided differently in the Eighth Circuit. [10]

* * *

USTC asks this Court to undo the verdict of a properly instructed jury in an error-free, month-long trial in which voluminous testimony was adduced on a wide-ranging, comprehensive scheme to exclude Conwood's products from fair competition. Its sufficiency-of-the-evidence challenges, however, present no legal issue in conflict with the decisions of this or any other court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 20, 2002

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[10] Underscoring the absence of any split between the Sixth and Eighth Circuits, in a more recent decision not cited by USTC, *EFCO Corp. v. Symons Corp.*, 219 F.3d 734, 739-40 & n.5 (8th Cir. 2000), the Eighth Circuit itself expressly confirmed its traditional view that a damages expert need not rule out all other possible causes of a plaintiff's injuries to be admissible.

Supreme Court, U.S.
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No. 02-603

IN THE

Supreme Court of the United States

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY, INC., UST, INC.,

Petitioners,

v.

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN WHOLESALE MARKETERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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CONWOOD COMPANY, L.P., *et al.*
Respondents.

BRIEF OF THE AMERICAN WHOLESALE MARKETERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE[1]

The American Wholesale Marketers Association ("AWMA") is a non-profit, trade association located in Washington, D.C., whose primary members are wholesaler-distributors serving the convenience store

[1] Pursuant to Sup. Ct. R. 37.6, the American Wholesale Marketers Association states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the AWMA, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.3(a) AWMA states that the parties of this proceeding have consented to the filing of this brief.

industry in the United States. AWMA wholesaler-distributor members represent more than 85 billion dollars in United States convenience product sales. The AWMA has over 400 wholesaler members, and there are another 600 non-member wholesaler businesses also servicing the convenience store industry. Associate members include manufacturers, brokers, and retailers. The variety of consumable products sold to convenience store retailers by AWMA members includes candy, tobacco, snacks, beverages, general merchandise, and food service.

While AWMA wholesaler members primarily sell to the convenience store chain, they also service other consumer outlets, such as grocery stores, drug stores, tobacco shops, and gasoline merchants. AWMA wholesalers often provide the primary, if not the only, means for manufacturers, especially those with smaller market share and fewer resources, to move their products to the ultimate consumer. Typically, wholesalers provide an excellent means by which many manufacturers can competitively place their products before consumers.

This brief is filed only in support of the petitioners' United States Tobacco Company, et al. ("USTC") request that the Supreme Court issue a writ of certiorari. Both the respondent Conwood Company, L.P., et al. ("Conwood)" and petitioner USTC are Associate manufacturer members

of the AWMA.[2] This AWMA *amicus* brief only relates to the first question[3] presented by USTC, *i.e.*:

> Whether liability under section 2 of the Sherman Act, 15 U.S.C. § 2, may be based on a manufacturer's misleading "suggestions" and "recommendations" to retailers where there is no foreclosure of the competitive process or of a substantial portion of the market.

STATEMENT OF RELEVANT MATTERS NOT ALREADY BEFORE THIS COURT

The AWMA's interest is that many of the trade practices discussed in detail in the *Conwood* decision, which upheld a determination of the defendant's violation of Section 2 of the Sherman Act, are used by and practiced regularly by wholesalers. Thus, the AWMA, seeking certainty in the marketplace for its members, is filing this *amicus* brief to attempt to clarify what trade practices shall be acceptable, reasonable, and appropriate in the convenience store chain of trade, whether implemented by

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[2]The AWMA takes no position regarding the ultimate determination of liability of the petitioner USTC to the respondent Conwood. The purpose of this brief is to set forth AWMA's concerns on behalf of wholesalers that previously acceptable trade practices are now in question and may be reviewed differently by the courts as a result of the exhaustive treatment accorded the convenience chain of commerce in *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002).

[3]Thus, the AWMA makes no comment on any issue relating to damages.

direct seller manufacturers or wholesalers. The AWMA is concerned that the *Conwood* decision could be applied to any person which is dominant in a relevant geographic or product market, with the result that AWMA wholesalers could be substantially affected.

Wholesaler distributors generally continue to play an important and relevant role in marketing channels and supply chains. A recent publication by the National Association of Wholesalers ("NAW") notes that, "[i]n 2000, sales of all wholesaler-distributors reached $2.8 trillion." Adam J. Fein, The Forces of Change Remain, *in Facing the Forces of Change: Outlook 2003* ix (Adam J. Fein, ed., 2002). Growing at a rate of 5.6% since 1991, wholesalers in all categories account for one in every 20 jobs in the United States and 7% of the entire national income. The NAW has determined that 75% of all product sales occur through distributors in a number of trade categories, including food service products. *Id.* at xi.

Usually, wholesalers are independent of manufacturers. The wholesaler relationship to the manufacturer can be likened to that of an agent in some instances and as a direct competitor in others (especially when the manufacturer is a direct seller). The wholesaler promotes a manufacturer's products, pushes its advertising, and passes through financial allowances, when appropriate. While one would never claim that relationships between manufacturers and wholesalers are always agreeable, friendly, and "professional," usually the wholesaler is the good "foot soldier" for the manufacturer. The financial success of the wholesaler is dependent upon

its ability to promote and sell a manufacturer's product. The NAW has stated:

> Manufacturers and distributors continue to rely on each other's actions and resources. Simultaneously, each side struggles to maintain autonomy and control over its own operations. . . . This mutual dependency creates conflicts about direction, strategy and commitments. Business relationships between manufacturers and distributors are not altruistic, nor should they be. Both parties need to perceive a benefit from the relationship.

Id. at xiii.

Trade practices of manufacturers quickly become those of wholesalers who add value by becoming category (product line) managers, creating promotions, assisting in the implementation of manufacturer promotions, providing sales information to retailers and manufacturers, assisting with retailer marketing, and, especially with regard to smaller and newer manufacturing enterprises, providing what may be the only avenue of market penetration. These competitive services, discussed in detail by the *Conwood* court, are the result of many years of business experience and development. The AWMA concern is that these previously accepted practices may no longer be appropriate and that wholesalers in a given economic market may be subjected to antitrust and, possibly, other actions for previously acceptable activities.

ARGUMENT

The *Conwood* decision deals with numerous day-to-day business practices used by wholesalers serving the convenience store industry. In one way or the other, category management is used by all convenience wholesale distributors. Various components which typically constitute category management were discussed in detail by the *Conwood* court. The misuse of category management, which is intended to assist a retailer in its operations, was specifically found to support a violation of the antitrust laws. It is important, particularly in the relevant chain of trade of AWMA members, that the wholesaler distributor clearly understands what the acceptable limits of category management are in today's markets. It is principally for this reason that the AWMA requests the Supreme Court issue the subject writ of certiorari.

Conwood can be read as condemning overly aggressive sales managers acting as category captains and/or managers, excessive "puffery", and extensive allowances and promotional payments under Section 2 of the Sherman Act. If this understanding is correct, then AWMA wholesalers need to know and understand what is, and is not, permissible under the antitrust laws. While an absolute outline of permissible activities is not reasonably expected, any guidance that the Supreme Court can provide this rapidly changing and growing marketplace would afford a certainty around which such businesses can base their competitive practices.

AWMA submits that the holding in *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999) conflicts with the *Conwood* holding. The Fifth Circuit in *Stearns* stated:

> All of these arguments made by FMC to its potential customers may have been wrong, misleading, or debatable. But they are all arguments on the merits, indicative of competition on the merits. To the extent they were successful, they were successful because the consumer was convinced by either FMC's product or FMC's salesmanship.

Id. at 524.

> Ultimately, Stearns does not and cannot claim that it has been excluded from competing on the merits. Every sales pitch and every suggestion that FMC made was evaluated by independent municipal actors who were concerned solely with the merits of the product they were charged with evaluating. Stearns was free to engage in identical tactics and tout the virtues of its product.

Id. at 527.

The Sixth Circuit in *Conwood* accepted the legal position that the cumulative effect of numerous tortious activities may rise to the level of a violation of the antitrust

laws, and a monopolist's collective tortious activities in a relevant market may properly be held to be a violation of Section 2 of the Sherman Act. It stated that:

> USTC contends that none of the practices Conwood complains of amount to antitrust violations, but are no more than isolated sporadic torts. We disagree. Conwood presented evidence that beginning in 1990, USTC began a systematic effort to exclude competition from the moist snuff market. Conwood presented sufficient evidence that USTC sought to achieve its goals by excluding competition and competitors' products by numerous avenues.

290 F.3d at 783.

In one case, bad acts by a competitor were found not sufficient pursuant to the antitrust laws, and in the other case, bad acts by a competitor were found sufficient to allow them to go to a jury, which found such actions illegal under Section 2 of the Sherman Act. While *Stearns* dealt with the ability of a small airport equipment manufacturer to compete against a substantial monopolist, the *Conwood* case deals with a trade area in which AWMA wholesalers are significantly involved. It appears that the *Stearns* and *Conwood* standards conflict to such an extent that there has been created an uncertainty in the convenience distribution channel. Thus, the AWMA and its wholesaler members have a significant interest in the determination of acceptable business activities which may be used in the convenience store chain.

The *Conwood* court states that "the first step in any action brought under Section 2 of the Sherman Act is for the plaintiff to define relevant product and geographic markets in which it competes with the alleged monopolizer." 290 F.3d at 782, citing *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 268-69 (2d Cir. 1979). The court also notes that "[a] geographic market is defined as an area of effective competition." 290 F.3d at 782, citing *Re/MAX Int'l., Inc. v. Realty 1, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999). While the *Conwood* decision applies to a nationwide manufacturer controlling 75 percent of the relevant market, its analysis would apply to any firm holding a dominant position in "an area of effective competition."

The *Conwood* court listed a number of specific USTC business practices that were impermissible, probably tortious, and which, when combined, were sufficient to uphold the Section 2 violation. Such practices included: 1.) removing Conwood sales racks and placing Conwood product lines in USTC racks to "bury" Conwood's products and reduce Conwood facings, 2.) using various "ruses," such as obtaining permission to reorganize and neaten any moist snuff section so as to destroy competitors' racks, 3.) misusing its category manager status by providing false and misleading information to retailers, and 4.) entering into exclusive agreements with retailers in an effort to exclude Conwood products.

The Court then criticized at length as impermissible exclusionary conduct under Section 2 of the Sherman Act various sales, marketing, and business practices employed

by USTC, *id.* at 774-780, which AWMA submits are utilized daily by its wholesaler members. The interest of the AWMA and its members is that all the various marketing practices discussed are used to supply product to the convenience store chain. While the wanton destruction of a competitor's property and tortious activity interfering with a competitor's ability to do business have been and should continue to be illegal under any number of theories, including common law tort and state fair trade laws, the following, discussed at length by the Sixth Circuit, have been acceptable trade practices[4].

1. The use of racks to display, hold, and market product is common in any commercial enterprise. While "facings" here dealt with slots in sales racks, the facings for other products presented to the consumer are carefully developed for many kinds of products. Although racks are discussed in *Conwood,* metal or wood stands, "lazy susan" displays, and coffee bean dispensers are other examples which are touted by manufacturers through wholesalers to retailers in any number of formats with any number of arrangements, deals, and promotions. The use of one distributor's display method over another's often involves contentious competition among competitors. It is not uncommon for distributors to pressure retailers

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[4] At the end of the discussion of USTC trade practices, the *Conwood* court discussed unauthorized rack removals by USTC, *id.* at 778-779. This practice is not common and has never been considered a legitimate business practice. It is not discussed in this brief as anything other than recognition of its being an unethical, if not tortious, activity.

to use that distributor's (or manufacturer's) display mechanism exclusively. In any event, the final decision regarding display methods should be left to the affected retailer.

2. Point-of-Sale ("POS") advertising is used extensively by various category managers to promote their products. As *Conwood* recognized, POS advertising is acutely critical to tobacco advertising, since such advertising is restricted outside a retail outlet. *Id.* at 774. POS advertising is also important for soft drinks and snacks, because it may identify the product's location in the store and indicate promotions which may exist. Wholesalers are often encouraged by manufacturers, which provide significant financial incentives to promote their products, to place POS advertising materials at retailers' establishments.

3. Category management[5] entails all elements of placing product in a retail outlet to most effectively induce favorable consumer response--a purchase. Wholesalers provide this service to many retail stores, and AWMA members particularly provide this to the convenience store chain. Depending on many factors, such as size, location, product mix, customer needs, and profitability, wholesalers will often provide this service to their convenience store customers. With wholesalers, category

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[5]The use of category captains was discussed by the *Conwood* court. The AWMA is unaware of this being a common tool used by wholesalers.

management can relate to a single product or to the bundling of different products and product lines. In any event, the intent is to maximize sales to the ultimate consumer. As the *Conwood* court discussed, many tools are used, such as allocating shelf space based on sales volume and the use of plan-o-grams, which are also used by wholesalers.

4. The *Conwood* court specifically discussed the role of category managers in the moist snuff trade. *Id.* at 785-787. Among other things, USTC, as the dominant competitor in the moist snuff category, would suggest that fewer moist snuff products (SKUs) be carried, usually pressuring that its competitors' products be limited or discontinued. USTC would attempt to limit price value brands[6]. The AWMA notes that, while the use of category managers is common with manufacturers, it is also a widely accepted practice within the convenience store chain wholesale business. Because wholesalers are involved with many products, they may "bundle" products, provide information on various products, pass through or create their own incentive programs, and assist their customers with such diverse marketing techniques as rack and product placement, sales data collection and distribution, and product analysis. It is not unusual for a wholesaler, often at the urging of its retailer

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[6] Price value brands typically are generic brands which sell for substantially less than a premium brand. Most often, it is a store brand which is placed near a brand name item, the store brand always being cheaper.

customer, to limit the number of product SKUs it carries in order to limit costs and inventory.

5. *Conwood* discussed the role of USTC in its attempts to remove price value products. AWMA wholesalers have battled each other for years on which product should be placed where in any retail outlet based on the product's value. In the cigarette business, there is a constant disagreement, i.e., competition, between those distributors selling what are known as third and fourth tier (cheaper) cigarettes and those promoting premium brand cigarettes. Likewise, there is a constant pressure being placed on retailers with regard to the store placement and sale of cheaper, bulk (generic) candy products versus name brand, more expensive confectioner products. The competition between value priced and premium quality products has been ongoing for many years, especially as the prices for premium products have increased.

6. USTC started its Consumer Alliance Program ("CAP") in 1998. *See Conwood* at 778. USTC gave retailers a promotional allowance for providing USTC with certain sales data and for participating in various promotional programs. This business practice is commonplace in the wholesale chain. An AWMA wholesaler will either participate in a manufacturer's incentive program and pass through part of the allowance to the retailer or implement a program of its own for its convenience store customers. There is little question that this technique is used to enhance the

> sale of a particular product or to induce a retailer to trade with a particular wholesaler or manufacturer.

The *Conwood* decision, its effect, and its rationale are just now becoming known in the antitrust legal field and in the wholesale-distributor industry. While various questions are now being raised, it would appear that the effects on three interrelated business practices--shelf space competition, category management, and POS advertising--are being discussed. For instance, in an article to be published in the ABA Antitrust Magazine, it was stated that:

> The importance of product display (and accompanying POS advertising) to competition in the moist snuff market was central to the Sixth Circuit's conclusion that USTC had violated Section 2 by persuading retailers to display its products more prominently than those of its competitors. That consideration, however, could as easily support a contrary argument: If product placement and POS advertising are the areas where competition takes place, they are the areas where competitors should legitimately focus their efforts.

Dennis Cross, *Monopolization or Competition? Reporting Snuff Wars,* ABA Section on Antitrust Law, 17 Antitrust Magazine (forthcoming 2002) (manuscript on file with author, at 6).

The issue relates to the extent to which companies and their sales force may focus their product promotion. In any retail operation in the United States, the placement of product and the relevant POS advertising become an issue of overriding concern and interest to the manufacturer, wholesaler and retailer. The more prominently a product is displayed and advertised to the consumer, the more likely it is that the consumer will purchase such item. In the AWMA wholesale chain, primarily directed at the convenience store market, this is the simplest explanation for what dictates wholesaler actions. From a rural convenience store in the Midwest to corner stores in New York City to even small kiosks on Capitol Hill, virtually every consumer purchases something--a candy bar, a quart of oil, a package of razor blades, a pack of cigarettes, a donut, or a cup of coffee--which probably has been distributed by a wholesaler. Although the ultimate decision is up to the retailer, the placement of each product, the amount of shelf space allocated, the promotions offered, and product merchandising are usually supported, developed or presented by a wholesaler for itself or, directly or indirectly, on behalf of a manufacturer.

Many of the sales practices employed by AWMA members were reviewed by the *Conwood* court. While there is no place in the marketplace for the outright destruction of competitors' property and for any knowing and material fabrication of sales data, many of the practices discussed in *Conwood* are customary. Most wholesalers would find it impossible to determine when information "puffery" on such diverse matters as quantity,

quality, consumer preference, sales data, and research, becomes illegal fabrication.

CONCLUSION

It appears that the *Conwood* decision is the first to detail sales practices of AWMA wholesalers which sell equivalent product lines to the same retailers who may also be served by manufacturers. It may be appropriate now to redefine and delineate future legitimate and acceptable business practices in this line of trade. In order to maintain a competitive process allowing wholesalers to compete with various manufacturer direct sellers, as much specificity regarding acceptable business practices and the consequences for such improper and illegal business methods must be established. If previous business practices, illegal under various local and state laws, common tort law, and fair trade statutes, can *in toto* rise to the level of an antitrust violation, the Supreme Court can now establish what the limits of acceptable competition are.

For all of these reasons, the Supreme Court should issue this writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES TOBACCO CO., UNITED STATES TOBACCO SALES AND MARKETING CO. INC., UNITED STATES TOBACCO MANUFACTURING CO. INC., and UST INC.,
Petitioners,

v.

CONWOOD CO., L.P.; and CONWOOD SALES CO., L.P.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION, STEPHEN E. FIENBERG, FRANKLIN M. FISHER, DANIEL L. McFADDEN, and DANIEL L. RUBINFELD AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION, STEPHEN E. FIENBERG, FRANKLIN M. FISHER, DANIEL L. McFADDEN, and DANIEL L. RUBINFELD AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF), Dr. Stephen E. Fienberg, Dr. Franklin M. Fisher, Dr. Daniel L. McFadden, and Dr. Daniel L. Rubinfeld respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners. Petitioners have consented to the filing of this brief; their letter of consent has been lodged with the Clerk

of the Court. Counsel for Respondents declined to consent, thereby necessitating the filing of this motion.

The individual *amici curiae* are three eminent economists (including one Nobel laureate) and one eminent statistician. None has any direct interest in the outcome of this litigation. Each has extensive experience in evaluating the types of economic evidence at issue in this case.

Dr. Stephen E. Fienberg is a professor of statistics and social science and former Dean of the College of Humanities and Social Sciences at Carnegie Mellon University. He served as co-chair of the National Research Council's Panel on Statistical Assessments in the Courts and was editor of the panel's findings published as *The Evolving Role of Statistical Assessments As Evidence in the Courts*, a standard reference work for lawyers and judges. He has served as President of the Institute of Mathematical Statistics and the International Society for Bayesian Analysis, as well as Vice President of the American Statistical Association. He has been elected as a member of the National Academy of Sciences.

Dr. Franklin M. Fisher is a professor of economics at Massachusetts Institute of Technology, where he has taught for more than 38 years. He served as the federal government's chief economic witness in *United States v. Microsoft* and was for many years IBM's chief economic witness in *United States v. IBM*. He is the author of 15 books and well over 100 articles; he has written extensively in the area of antitrust economics. He is a fellow and past President of the Econometric Society and for nine years was the editor of that society's journal, Econometrica.

Dr. Daniel L. McFadden is the recipient of the 2000 Nobel Prize in economics for his work in econometrics. He is the Director of the Econometrics Laboratory and a professor of economics at the University of California, Berkeley. He has taught economic theory, econometrics, and

statistics at the graduate level since 1962. He has published seven books and more than 100 professional papers, the majority related to econometric methods and their applications.

Dr. Daniel L. Rubinfeld is a professor of law and economics at the University of California, Berkeley. He served as Deputy Assistant Attorney General in the Justice Department's Antitrust Division during the Clinton Administration. His current research interests relate directly to issues of antitrust enforcement, competition policy, and law and statistics. He is the co-author of two textbooks, "Microeconomics" and "Econometric Models and Economic Forecasts," and the author of more than 100 articles. He is currently a Director of LECG, LLP, which has been employed by Petitioners in connection with this litigation. Other than this brief, Dr. Rubinfeld himself has no involvement in the litigation and no direct interest in its outcome.

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states. WLF has devoted substantial resources over the years to the promotion of civil justice reform, including tort reform. WLF has appeared as *amicus curiae* in several recent cases in which the Court has addressed the gatekeeping function of federal judges with respect to the admission of expert testimony. *See, e.g., Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Amici believe that the quality of decision-making in the federal courts on economic issues is largely dependent on the willingness of federal judges to take seriously their responsibility as gatekeepers, to ensure that unsound scientific and economic evidence is not presented to the

finder of fact. In *amici*'s view, the lower federal courts are in need of additional guidance in this area; the record in this case suggests strongly that they are not doing enough to ensure that only sound economic science is being admitted into evidence. Collectively, *amici* possess significant relevant experience regarding the essential components of sound economic modeling. *Amici* believe that that experience will be of assistance to the Court in reviewing the petition.

Amici are filing this brief because of their interest in ensuring that unsound economic science is excluded from our nation's courts. They have no direct interest, financial or otherwise, in the outcome of this lawsuit.

For the foregoing reasons, Dr. Stephen E. Fienberg, Dr. Franklin M. Fisher, Dr. Daniel L. McFadden, Dr. Daniel L. Rubinfeld, and the Washington Legal Foundation respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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November 20, 2002

QUESTIONS PRESENTED

Amici curiae address the following question only:

Whether the largest damages award in the history of the antitrust laws ($1.05 billion) may be imposed without disaggregating the effects of lawful competition or other marketplace factors and without linking plaintiff's injury to any antitrust misconduct.

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INTERESTS OF *AMICI CURIAE*

The individual *amici curiae* are three eminent economists (including one Nobel laureate) and one eminent statistician.[1] None has any direct interest in the outcome of this litigation. Each has extensive experience in evaluating the types of economic evidence at issue in this case.

Dr. Stephen E. Fienberg is a professor of statistics and social science and former Dean of the College of Humanities and Social Sciences at Carnegie Mellon University. He served as co-chair of the National Research Council's Panel on Statistical Assessments in the Courts and was editor of the panel's findings published as *The Evolving Role of Statistical Assessments As Evidence in the Courts*, a standard reference work for lawyers and judges. He has served as President of the Institute of Mathematical Statistics and the International Society for Bayesian Analysis, as well as Vice President of the American Statistical Association. He has been elected as a member of the National Academy of Sciences.

Dr. Franklin M. Fisher is a professor of economics at Massachusetts Institute of Technology, where he has taught for more than 38 years. He served as the federal government's chief economic witness in *United States v.*

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici*, their employees, and their counsel, contributed monetarily to the preparation and submission of this brief.

Microsoft and was for many years IBM's chief economic witness in *United States v. IBM*. He is the author of 15 books and well over 100 articles; he has written extensively in the area of antitrust economics. He is a fellow and past President of the Econometric Society and for nine years was the editor of that society's journal, Econometrica.

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Dr. Daniel L. Rubinfeld is a professor of law and economics at the University of California, Berkeley. He served as Deputy Assistant Attorney General in the Justice Department's Antitrust Division during the Clinton Administration. His current research interests relate directly to issues of antitrust enforcement, competition policy, and law and statistics. He is the co-author of two textbooks, "Microeconomics" and "Econometric Models and Economic Forecasts," and the author of more than 100 articles. He is currently a Director of LECG, LLP, which has been employed by Petitioners in connection with this litigation. Other than this brief, Dr. Rubinfeld himself has no involvement in the litigation and no direct interest in its outcome.

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Amici believe that the quality of decision-making in the federal courts on economic issues is largely dependent on the willingness of federal judges to take seriously their responsibility as gatekeepers, to ensure that unsound scientific and economic evidence is not presented to the finder of fact. In *amici*'s view, the lower federal courts are in need of additional guidance in this area; the record in this case suggests strongly that they are not doing enough to ensure that only sound economic science is being admitted into evidence, and that substantial antitrust judgments are being awarded without adequate proof of damages. Collectively, *amici* possess significant relevant experience regarding the essential components of sound economic modeling. *Amici* believe that that experience will be of assistance to the Court in reviewing the petition.

STATEMENT OF THE CASE

In the interests of brevity, *amici curiae* hereby adopt by reference the Statement of the Case contained in the Petition.

In support of their antitrust damage claim, Respondents (hereinafter "Conwood") relied in large measure on the testimony of Dr. Richard Leftwich, an expert on business

valuation. Leftwich arrived at his estimate of Conwood's damages by constructing an economic model intended to approximate the moist snuff sales Conwood would have generated in the 1990-97 period but for the conduct of Petitioners (hereinafter "USTC") that allegedly violated the antitrust laws. Pet. 8-9. The Sixth Circuit affirmed the district court's decision to admit Leftwich's testimony and damages study under Rule 702 of the Federal Rules of Evidence. Pet. App. 36a-42a. It also affirmed the $1.05 billion judgment entered against USTC. *Id.* 44a. This brief focuses on the admissibility of Leftwich's testimony and damages study, as well as the admissibility of the damages-related testimony of William Rosson, Conwood's CEO; and whether that evidence was sufficient to support the damage award in this case. We do not address the first question raised by the Petition, which focuses on the liability issue.

REASONS FOR GRANTING THE PETITION

There is an increasing need for the Court to establish standards for economic science in antitrust cases and other cases requiring economic modeling for the computation of damage awards. The Court confirmed in *Daubert* the importance of screening all expert testimony to ensure that it is reliable before admitting it into evidence under Rule 702 of the Federal Rules of Evidence. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Court later confirmed in *Kumho Tire* that *Daubert*'s framework for analyzing the admissibility of testimony applies to *all* types of expert testimony -- including testimony relating to economic and statistical science -- not merely to expert testimony relating to the physical sciences. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Failure by federal courts to exercise their gatekeeping function with respect to expert

testimony by economists diminishes the utility of the economics profession in the courtroom, reduces its credibility, creates the possibility of unjust and economically-perverse results, and frustrates the objective of economics to create efficiency in the use and distribution of resources and products.

The Petition amply demonstrates the serious conflict among the federal circuit courts regarding the proof required to establish antitrust damages. Pet. 20-27. *Amici* write separately because they believe that this case provides an important opportunity for the Court to clarify what constitutes the appropriate standard for admissible economic and statistical evidence, an issue that is arising with increasing frequency in federal court proceedings. Self-evidently, evidence that is inadmissible under Rule 702 cannot assist an antitrust plaintiff in meeting its burden in proving damages.

The individual *amici* are economists and a statistician renowned for their expertise in the types of economic evidence submitted by Conwood in support of its claim for damages. In our view, the expert testimony submitted by Conwood in support of its unprecedented $1.05 billion damage award did not meet Rule 702's exacting requirement of reliability and relevance and thus should not have been admitted into evidence. Conwood's damages expert, Dr. Richard Leftwich, submitted an analysis comprised of an unsubstantiated theory, deficient methodology, and the use of a standard tool of economic analysis -- regression analysis. The Sixth Circuit correctly noted that regression analysis is a standard tool for proving antitrust damages. Pet. App. 40a. But the use of a standard economic tool does not by itself render expert testimony reliable, as the appeals court appeared to believe. Rather, *Daubert* also requires a careful

examination of the expert's underlying economic theories and methodological assumptions to ensure that the proffered expert testimony is "not only relevant, but reliable." *Daubert,* 509 U.S. at 589. The appeals court's unwillingness to undertake anything more than a rudimentary examination of Leftwich's methodology warrants review by this Court.

I. THE COURT SHOULD CONSIDER WHETHER EVIDENCE SUBMITTED BY CONWOOD ON DAMAGE ISSUES WAS ADEQUATE TO ESTABLISH DAMAGES AND WHETHER IT MET RULE 702's RELEVANCE AND RELIABILITY REQUIREMENT

The sections that follow summarize the results of an analysis of Conwood's damages evidence performed by the four individual *amici*. All four conclude that Conwood's damages evidence (which took the form of testimony by Dr. Richard Leftwich and Conwood CEO William Rosson) did not constitute reliable or relevant economic and statistical science. We conclude that Conwood failed to present economically and statistically sound evidence that it suffered any damages as a result of USTC's actions, and that the trial court should never have admitted into evidence the proffered testimony. *Amici* can only conclude, based on the Sixth Circuit's affirmance of the damage award on the basis of this deficient evidence, that there is considerable confusion in the lower federal courts regarding the quantum and quality of evidence necessary to sustain an award of damages in an antitrust case. Review by this Court is warranted in order to clear up that confusion.

A. An Expert's Use of Standard Economic Tools Does Not Ensure That the Expert's Final Work Product Is Reliable

To be useful in a legal context, a scientific experiment should be both relevant to the question at hand and capable of producing results that are reliable. In the case at hand, Dr. Leftwich was asked by Conwood to estimate damages suffered by Conwood as a result of USTC's alleged unlawful acts. Standards for the economics profession call for such an analysis to develop tests that indicate: (1) whether Conwood suffered any adverse consequences from USTC's alleged unlawful acts; and (2) if so, the amount of any financial harm due to the alleged unlawful acts.

The analysis is relevant if it derives from a theory of how damages occurred consistent with economic science ("theory of damages"). The analysis should test that economic theory against the relevant facts to determine if damages occurred.[2] If damages are found to have occurred, the analysis should isolate and measure the impact of the alleged unlawful conduct. The analysis is reliable if the empirical application of the theory isolating the alleged misconduct is correctly structured, performed, and tested, and if the results do not substantively change with reasonable choices of specification and data.

In the case at hand, Dr. Leftwich asserted that a "foothold" theory of damages was applicable. This theory posited that alleged unlawful actions by USTC had a greater

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[2] The Court in *Daubert* noted that the trial judge must assess "whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert,* 509 U.S. at 593.

impact on the growth of Conwood's market share in states where Conwood initially had a small market share than in states where Conwood initially had a large share. Based on this "foothold theory," Dr. Leftwich performed a regression analysis to assess the relationship between Conwood's initial state-level market share and Conwood's subsequent market share growth in two periods, 1984-90 and 1990-97. He found no relationship between initial market share and market share growth in the 1984-90 period preceding USTC's alleged unlawful acts. In the 1990-97 period, he found a positive relationship between initial market share and market share growth. Making the critical assumption that all systematic differences in 1990-97 market share growth between small share states and large share states were the result of USTC's wrongful acts, Dr. Leftwich used the results of the regression analysis to estimate Conwood's market share "but-for" USTC's alleged unlawful acts, which he in turn used to calculate damages.

The appeals court correctly noted that regression analysis was a standard tool of economic and statistical science. However, it failed to recognize the lack of a scientific foundation for Dr. Leftwich's "foothold theory" and the inability of Dr. Leftwich's model to isolate the impact of USTC's alleged unlawful acts from the effects of lawful competition or other market forces.

B. Leftwich Provided No Basis in Economic Science for His "Foothold Theory"

Dr. Leftwich neither presented his "foothold theory" with any reference to any accepted economic theory nor did

he present it as an extension of an accepted economic theory.[3] As such, Dr. Leftwich failed entirely to provide any proper scientific basis for his analysis.[4] Instead, Dr. Leftwich *assumed* that any change from the 1984-90 period to the 1990-97 period in the relationship between initial market share and subsequent changes in market share was due solely to USTC's alleged unlawful actions instead of being due to any other competitive factor that could have a differential impact depending on initial market share. Dr. Leftwich's "foothold theory" itself suggests that other competitive factors could have such an impact. Dr. Leftwich found a change in the relationship, but his *conclusion* that the cause of that change was the alleged unlawful acts of USTC was just an *assumption* that was built into his methodology. Such circular reasoning is unacceptable science: it is incumbent upon the expert to provide a theory of damages with a substantive foundation and to use the facts to test that theory.[5]

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[3] Professor David Kaye of Arizona State University identified "severe methodological flaw[s]" in Dr. Leftwich's "foothold theory," concluding that it could not meet the *Daubert* standard. D.H. Kaye, "The Dynamics of *Daubert*: Methodology, Conclusions, and Fit in Statistical and Econometric Studies," 87 VA. L. REV. 1933, 1996-98, 2006-11 (2001).

[4] In fact, a separate analysis by Dr. Leftwich using USTC's expert's data contradicts his "foothold theory": it assumes that any impact of USTC's "bad acts" on Conwood market share is constant across states rather than affecting large-share and small-share states differentially.

[5] This may have required more data than Dr. Leftwich had available or a different theory of damages, but it does not excuse Dr. Leftwich for not formulating a substantive theory of damages. The integrity of the result rests on the application of a scientific methodology, and a lack of data to validate a theory cannot excuse

(continued...)

Since he failed to provide any scientific basis for this relationship, Dr. Leftwich's analysis had no economic relevance.

C. Leftwich's Analysis Failed to Isolate the Impact of USTC's Unlawful Acts

Dr. Leftwich's analysis did not determine the extent to which any changes were caused by USTC's alleged unlawful acts as opposed to lawful and competitive acts. If one accepts Dr. Leftwich's "foothold theory," then changes in other competitive factors also could have a disproportionate influence in small Conwood market share states.[6] Dr. Leftwich, however, assumed that nothing aside from USTC's alleged unlawful acts had any differential impact. Moreover, Dr. Leftwich presented no economic theory to indicate what market share would give Conwood a "foothold."[7]

An appropriate economic analysis of damages would identify the wrongful acts and devise a scientific test to measure their impact as distinct from those of lawful competitive actions. Dr. Leftwich, however, simply defined an impact and assumed that any (and only) acts eventually

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[5](...continued)
presenting the hypothesis as a scientific conclusion.

[6] Dr. Leftwich argued that it was unlikely for other competitive factors to systematically differ across states, but he failed to recognize that the *impact* of these factors could systematically vary across states. Trial transcript ("Tr.") Vol. VII, at 85-92.

[7] Dr. Leftwich's "foothold theory" provides no economic basis for his choice of a 15 or 20 percent threshold separating "large share" from "small share" states when calculating his "but-for" market shares.

found to be unlawful, *whatever their identity and extent*, created that impact. Yet the record in this case established that there were a number of competitive factors in the marketplace that were present to a greater degree in the 1990-97 period than in the 1984-90 period and could have affected market shares. These included, for example, the introduction of new brands (especially price-value brands) (Tr. 2259-60), limitations on advertising (Tr. 2261-63), and restrictions on self-service (Tr. 3661-62).

Dr. Leftwich failed to show that these other competitive factors in the marketplace would not have had a disproportionate influence in small Conwood market share states. Nor did he present any reasonable economic argument as to why these other factors could not result in market impacts similar to the one he believes was caused by USTC's alleged unlawful acts. Furthermore, he provided no method for apportioning any market impact between lawful and unlawful factors. If these other factors had similar market impacts, then Dr. Leftwich's use of initial Conwood market share as a proxy for the market impact of USTC's alleged unlawful acts would be improper and his findings would lack any probative value.

Instead of recognizing the potential impact of these other factors, Dr. Leftwich simply dismissed them and made the incredible assumption that nothing else other than USTC's alleged unlawful acts had a differential impact across states. Dr. Leftwich provided no basis for making this assumption, and thus he had no basis to conclude that any change in the relationship between initial market share and subsequent growth after 1990 was due solely to USTC's alleged unlawful acts.

D. Rosson's Testimony Does Not Meet the Standards for a Proper Damage Analysis

William Rosson, CEO of Conwood, testified at trial that he believed that Conwood's national market share, absent the alleged actions by USTC, would have been "in the 20s. Mid, say, 22 or 23 percent." Tr. 120. No methodology or data was presented to support this opinion.

When Mr. Rosson opined as to the "but-for" market share, he stepped out of the shoes of a knowledgeable industry executive and into the shoes of a market analyst. At that point Mr. Rosson should have been held to the same standards as any other expert opining on how a market would have performed in a "but-for" world. Mr. Rosson's testimony did not meet the standards that would be applied by economic science. Allowing what is essentially expert economic testimony to be presented with no scientific basis defeats the intent of the *Daubert* ruling and trivializes the role of economic and statistical analysis in the courtroom.

II. REVIEW IS WARRANTED BECAUSE OF THE INCREASINGLY IMPORTANT ROLE OF ECONOMICS IN THE COURTROOM AND THE RESULTING NEED TO PROVIDE GUIDANCE REGARDING THE APPLICATION OF *DAUBERT* TO ECONOMIC AND STATISTICAL ISSUES

Today, economic and statistical science has an increasingly significant role in the courtroom. It is the basis for measuring damages, and sometimes liability, in a wide range of legal cases. These range from antitrust cases, to labor discrimination cases, to tort cases, to securities cases, to many others. It is critical that economic and statistical

science in the courtroom meet the standards of the economics field, as the potential implications of erroneous decisions based on faulty evidence are enormous. Not only can erroneous decisions result in exchanges of dollars between litigants that are either too high or too low, but the precedential value of a misinformed decision can create perverse incentives for market participants that can reduce economic efficiency and harm consumers. Review is warranted in light of the increasingly important role of economic and statistical science in 21st century litigation and the importance of ensuring that such scientific evidence not be misused.

Outside of the legal setting, economic and statistical science imposes many hurdles for research to overcome before it becomes accepted widely. The peer-review process ensures that published research uses an appropriate methodology, can be replicated, has been thoroughly vetted, and recognizes prior work in the area. The process can be arduous and painstakingly slow, but it allows peers in the profession many opportunities to evaluate, critique, and respond. As a result, "bad science" does not get very far in this process. The hurdles imposed by the peer-review process maintain the standard for economic and statistical science.

The hurdles in the legal process are much more limited. Typically, each side in an antitrust or damages dispute retains an economic expert. Even though by definition, and by law, an expert is a disinterested professional who opines on damages, it may be unclear to jurors and judges whether the

testimony of experts is in fact disinterested.[8] Lacking a clearly neutral expert, lay juries and judges understandably may have difficulty distinguishing between simple posturing and legitimate criticisms regarding another expert's work. With only diametrically opposing views to consider, a jury can easily fail to see the difference between "good science" and "bad science." As a result, "bad science" is likely to be granted much more credibility before a jury than would occur within the profession. Unjust and socially-harmful outcomes can and will result if "bad science" forms the foundation of the jury's decision.

By granting review in this case, the Court can provide lower courts with desperately needed guidance regarding the

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[8] Several court decisions have suggested that the use of a court-appointed, neutral expert could improve matters, but this approach has not been applied widely. Judge Richard Posner has proposed that the use of a neutral expert could assist a court in recognizing better the scientific shortcomings of such expert submissions. Richard Posner, *Antitrust Law* (2nd ed. 2001) at 277-278. He proposed that courts could follow an approach similar to the typical approach for arbitration matters: each party would propose a technical expert who would in turn agree upon a third, neutral expert to be appointed by the court. Judge Posner recently recommended the court use its own expert in a remand to the district court in *High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 665 (7th Circuit 2002). Professor Daniel Rubinfeld has recommended the use of a neutral expert as being of possible assistance. Daniel Rubinfeld and Peter Steiner, "Quantitative Analysis in Antitrust Litigation," 46 LAW & CONTEMP. PROBS. 69 (1983); Daniel Rubinfeld, "Econometrics in the Courtroom," 85 COLUM. L. REV. 1048 (1985). The National Research Council's Panel on Statistical Assessments in the Courts, co-chaired by Professor Stephen Fienberg, has also recommended increased use of court-appointed experts. Fienberg, ed., *The Evolving Role of Statistical Assessments As Evidence in the Courts* (Springer-Verlag: New York, 1989) at 169-172.

proper use of economic and statistical evidence. In addition, guidance is needed regarding the circumstances under which courts may turn to impartial experts for technical assistance, and the circumstances under which such assistance is essential. It may be that there are some circumstances -- with this case a prime example -- in which trial courts cannot effectively perform their gatekeeping function without the assistance of an impartial expert.

Science requires proof or disproof of particular theories using given tools in a methodical way. The standard for admissibility set forth in *Daubert* should require the courts to consider whether the opinions offered by an expert are grounded in theory that has a scientific basis and whether the expert's theory has been validated by sound methodology and data. Whether an opinion offered as science has the veneer of respectability due to the use of standard tools is not a standard that maintains the integrity of the profession. Tools do not by themselves amount to science, just as the use of a hammer does not guarantee that a house will be architecturally sound.[9]

Without a competent scientific framework underlying the analysis, the results of calculations offered by experts are meaningless. For instance, regression analysis measures correlations but does not by itself impart causal meaning to

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[9] Professor Franklin Fisher has observed, "Finally, one should make sure that the model used is constructed on sound hypotheses based on theoretical considerations *generated from outside the model itself.* While regression analysis and related econometric techniques are powerful tools for analyzing data, their proper use presupposes an underlying theory of the structure generating those data." Franklin Fisher, "Multiple Regression in Legal Proceedings," 80 COLUM. L. REV. 702, 735 (1980) (emphasis added).

those correlations.[10] Regression analysis is simply a tool for establishing a statistical link between economic theory and real-world data. Without a soundly-based economic foundation and empirical statistical model evaluation, regression analysis merely presents descriptive statistics, without analytic content from which conclusions can properly be drawn.

This distinction between scientific theories and the tools of economic science appears to have been lost on the Sixth Circuit. As a result, it affirmed the trial court's judgment on damages based primarily on its erroneous view that use of regression analysis is sufficient to establish the reliability of economic and statistical evidence. The fact that a federal appeals court could make such a fundamental error in a field of such enormous importance strongly suggests that this Court should grant review to clarify this critical and recurring area of law. At the same time, we urge it to give further guidance regarding the rules and procedures governing the lower federal courts' exercise of their gatekeeping function.

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[10] As explained by Professors David Kaye and David Freedman, "Observational studies can establish that one factor is associated with another, but considerable analysis may be necessary to bridge the gap from association to causation. . . ." "Naturally, the value of the statistical analysis depends on the substantive economic knowledge that informs it." Kaye and Freedman, "Reference Guide on Statistics," *Reference Manual on Scientific Evidence* (Federal Judicial Center 2000, 2nd ed.) at 91, 87. Some of the analysis necessary to bridge the gap from association to causation can come from embedding regression models into larger statistical frameworks for assessing causality, but this requires enormous care and empirical as well as substantive support. *See, e.g.*, Peter Spirtes, Clark Glymour, and Richard Scheines, *Causation, Prediction, and Search* (MIT Press 2000, 2nd ed.).

CONCLUSION

Amici curiae respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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Date: November 20, 2002

No. 02-603

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FILED
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CLERK

IN THE

Supreme Court of the United States

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., UST INC.,

Petitioners,

v.

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Seldom has there been a deeper divide between opposing certiorari briefs filed with this Court. Petitioners ("USTC") and two amici argue that the Sixth Circuit's misguided reading of antitrust caselaw under section 2 of the Sherman Act, 15 U.S.C. § 2, directly conflicts with the rulings of this Court and of various Circuits, would severely curtail competitive practices by consumer product manufacturers and distributors, and could result, as here, in the imposition of unprecedented treble damages without proof of lost profits flowing solely from antitrust misconduct. Respondents ("Conwood") brush all this aside, suggesting that the case boils down to a prosaic dispute about the quantum of evidence needed to support a jury verdict. That is emphatically not so.

But this Court need not take our word or the analyses of amici and the impressive authorities they muster.[1] We suggest that this Court invite the Solicitor General to present the views of the United States and the Federal Trade Commission. Their perspectives are especially relevant in private antitrust litigation because "[t]he United States, which has primary responsibility for enforcement of the federal antitrust laws, has a substantial interest in assuring that the Sherman Act is construed in a manner that advances the Act's objective

[1] Three recent articles explore the concerns that the decision below will lead to a multitude of private suits and unrestrained damage awards. *See* D. Kaye, *The Dynamics of Daubert: Methodology, Conclusions, and Fit in Statistical and Econometric Studies*, 87 Va. L. Rev. 1933, 1988-2013 (2001); D. Cross, *Report From The Snuff Wars*, ABA Sec. of Antitrust Law, 17 Antitrust Magazine, Issue No. 1 (Fall 2002) (forthcoming) (lodged with the Clerk's office); D. Balto, *The 'Conwood' Decision*, National Law Journal p. B8 (Aug. 19, 2002).

of protecting the Nation's competitive economic system." Amicus Brief for the United States at 1 (Jan. 3, 1983) filed in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

Conwood rewrites the Sixth Circuit's analysis in order to assert that this is a fact-bound case that "does not allege a single error of law." Opp. 1. Nothing could be further from the truth. *First*, we challenge the law applied by the lower court, not its factual summary or the quantum of evidence presented by Conwood. We likewise challenge the trial court's admission and the jury's reliance on Conwood's damages evidence—as we did at all times in the courts below—because that evidence violates the fundamental principles of *Daubert*, *Joiner*, and *Kuhmo Tire*[2] and the rulings of several Circuits.

Second, just as *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), served as a vehicle to mark the boundaries of lawful price competition, the holding here provides an optimal case for developing similarly clear and consistent antitrust rules applicable to nonprice competition. This Court has never directly reviewed the parameters of permissible everyday sales practices (e.g., the aggressive use of innovative racks, category management) or whether they can be combined with tortious conduct to become the basis for a section 2 violation.

Third, the Sixth Circuit committed grievous error when it ruled that Conwood was not required to present damages evidence disaggregating the effects of lawful conduct. As a consequence, there is no such evidence in the record because Conwood had asserted in the lower courts that "disaggre-

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[2] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

gation is not a requirement," Conwood 6th Cir. Br. 61, and its damages expert assumed that only unlawful conduct could have restrained Conwood's growth in the 1990s.

I. THE PETITION RAISES CRITICAL QUESTIONS OF LAW, NOT SIMPLY FACT-BOUND SUFFICIENCY ISSUES

Conwood's primary response to virtually every argument in the Petition is that because the jury instructions were not challenged, the trial court could not have committed any "error of law" and thus there are no important conflicts among the Circuits that need to be resolved. *See, e.g.*, Opp. 13. However, instructions are intended only to guide the jury's assessment of facts and the conclusions it may draw. *See, e.g., United States v. Lewis*, 53 F.3d 29, 34 (4th Cir. 1995). The Court must determine what actions can constitute exclusionary conduct under section 2. *See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984) (setting boundaries of invalid tying arrangements). Here the lower court held, *inter alia*, that USTC's recommendations and suggestions to customers that they carry its products rather than those of a competitor could violate section 2. Pet. App. 26a. This expansive reading of section 2 creates a direct conflict with the Fifth Circuit's ruling in *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999), and raises a profound legal question on the reach of the antitrust laws separate and apart from a proposed jury instruction on "exclusionary conduct."

Nor can Conwood escape the Sixth Circuit's erroneous analysis of USTC's marketing recommendations by pointing to the purported "outright exclusion" caused by retailer selection of USTC's racks in 21,000 stores and of CAP incentive payments in 37,000 stores. These agreements are not the result of any coercion and they cannot harm competition without showing that rivals were foreclosed from a

substantial segment of the market over a significant period of time. *See Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997) (no exclusion where agreements were of short duration and readily terminated). Conwood's undifferentiated claims do not demonstrate exclusion and are belied by the undisputed fact that its products were on more than 80% of retail store shelves in the 1990s and that new products such as the discount price value brands (led by Timberwolf) successfully entered the market. Pet. 19, 23-24. *See R.W. Int'l Corp. v. Welch Food, Inc.*, 13 F.3d 478, 488 (1st Cir. 1994) (no foreclosure or harm to competition where "new product is able to deeply penetrate the market").

Conwood's failure to distinguish legal questions from quantitative sufficiency issues is particularly evident in its discussion of the disaggregation requirement. While there is no dispute among the Circuits that the jury should be instructed that a plaintiff may not recover antitrust damages caused by lawful competition or other market forces, the Sixth Circuit now lies in conflict with other Circuits on the corollary rule that the plaintiff must provide the jury with *evidence* from which it can reasonably segregate those other effects. *See* Pet. 21-22. There was no such evidence in this case and Conwood points to none. The Sixth Circuit's attempt to fill this gaping hole by *presuming* that the jury followed the trial court's instruction, Pet. App. 42-43a, conflicts with the ruling in *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1224 (9th Cir. 1997), and other cases.

II. AGGRESSIVE NONPRICE SALES PRACTICES THAT ADVANTAGED USTC DO NOT VIOLATE SECTION 2

Conwood argues that USTC's aggressive sales practices constituted illegal exclusionary conduct under section 2 because they were not "legitimate business conduct."

Opp. 14. That is false in both law and fact. Practices designed to increase sales, even at a competitor's expense, are permissible unless the practices themselves are unreasonably exclusionary. *See, e.g.*, *Brooke Group*, 509 U.S. at 222-24 (lower prices that are above cost are not exclusionary even if deliberately designed to take market share from competitors); *Stearns*, 170 F.3d at 527 (same re nonprice sales tactics). Conwood trumpets the fact that USTC's conduct included instances of unauthorized rack removals and misleading statements. While that finding might support a tort claim,[3] Conwood voluntarily dismissed those claims during trial. The mere existence of tortious acts cannot, by themselves, convert procompetitive conduct into exclusionary behavior. *See, e.g.*, *Integraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1367 (Fed. Cir. 1999) ("[e]ach legal theory must be examined for its sufficiency and applicability, on the entirety of the relevant facts"). In addition, without foreclosure of a substantial segment of the market, there can be no adverse effect on competition.

Conwood also distorts the trial record by asserting that USTC "never even attempted to offer 'valid business reasons' for any facet of" its conduct. Opp. 14. To the contrary, that was a central theme presented to the jury by USTC's fact witnesses, *see, e.g.*, JA 2000, and also the basis for arguments presented in its JMOL motion to the trial court. Indeed, the Sixth Circuit specifically noted that retailers requested USTC's racks because they were more "efficient," "enhanced demand" and "buil[t] customer loyalty." Pet. App. 6a, 18-19a.

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[3] We say "might" because the lower court identified such practices as tortious even though Conwood made no showing that they were unauthorized. *See Restatement of Torts (Second)* § 892A (1979). Instead, the Sixth Circuit shifted the burden to *USTC* requiring it to show that "these acts were authorized by the stores." Pet. App. 25a.

That USTC executives, including its chairman, did not condone examples of unauthorized rack removal and product displacement is, of course, wholly beside the point. Candid acknowledgment that some actions were contrary to the company's standards is not evidence of antitrust misconduct. *See, e.g., Brooke Group*, 509 U.S. at 225.

Finally, Conwood's attempt to discount the intercircuit conflicts regarding proof of section 2 liability is not persuasive. First, *Stearns* did not simply involve a monopolist "'vigorously stressing the qualitative merits of its product'" as Conwood argues. Opp. 17. The Fifth Circuit expressly held that an "orchestrated" campaign to take business from a competitor through "wrong, misleading or debatable" conduct did not violate section 2 because the customers (like the retailers here) were free to consider proposals from rival suppliers and because the purpose of that conduct was to increase sales of defendant's products. *Stearns*, 170 F.3d at 521 & 524. It cannot be disputed that the same open competitive process and the same rational business purpose justified USTC's sales practices. Pet. App. 6-7a, 26a.

Second, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), cannot be read as supporting Conwood's argument that a section 2 plaintiff need not prove that a significant segment of the market was foreclosed. In *Microsoft*, the D.C. Circuit specifically held that plaintiff must prove foreclosure of a "substantial percentage" of market opportunities. *Id.* at 70-71. Its finding of liability was based on Microsoft's shutting Netscape out from virtually all outlets. *Id.* Had there been meaningful exclusion here, USTC's competitors would not have been able to double their market share in the 1990s, nor would new brands have been able to capture a significant market share during 1994-98.

III. THE STANDARDS OF PROOF FOR ANTITRUST DAMAGES ARE UNCLEAR AND IN CONFLICT

Seeking to avoid the imperative need for this Court's clarification of proof of antitrust damages, Conwood oddly argues that USTC has "abandoned" its *Daubert* challenge to the admissibility of the Leftwich and Rosson testimony. In the same breath, however, Conwood admits that "most of the cases cited by USTC" are "*Daubert* cases dealing with the 'gatekeeper' function of the court in admitting expert testimony," Opp. 28, thereby conceding that our Petition pointedly includes a challenge based on Circuit conflicts derived from the *Daubert* trilogy.

Conwood further seeks to justify its damages judgment by arguing that Leftwich's study relied on "accepted statistical methods," reviewed "an array of additional hypotheses," and "considered and ruled out all of the additional alternative 'explanations that USTC's own expert suggested.'" Opp. 25-27. However, this attempted diversion only highlights the bankruptcy of Leftwich's theory. That hypothesis posits that Conwood's sales percentage in low share states should have increased the same amount as in high share states regardless of past experience; and any failure to meet that growth target is presumed to be the result of exclusionary conduct. But that theory is devoid of economic content, has never been tested, has never been subject to peer review and publication, and has never been applied in any other antitrust case. *See Daubert*, 509 U.S. at 593-94. Indeed, the critical assumption of Leftwich's theory—that poor performance by Conwood in low share states can be explained only by exclusionary practices rather than normal market forces—is contrary to basic economics. The moist snuff market is a four-firm oligopoly and peer reviewed literature shows that such markets generally exhibit stable market shares. F. Scherer & D. Ross, *Industrial Market Structure and Economic*

Performance 90 (3d ed. 1990) (reviewing empirical literature). That is, Leftwich's statistical study purported to identify a phenomenon that is so common that it occurs at a statistically significant level in 90% of oligopoly markets. *See, e.g.,* M. Gort, *Analysis of Stability and Change in Market Shares*, 71 J. Pol. Econ. 51 (1963). Oblivious to this history, Leftwich's finding that market share stability proved the existence and effect of USTC's exclusionary practices is scientifically unsound.

Conwood's contention that Leftwich applied traditional before-and-after and yardstick tests is transparently false. While Conwood asserts that Leftwich used these standard tests in assessing the validity of his low share state theory, *see* Opp. 25, his study did not even approximate recognized applications of either method.[4] Properly applied here, both tests show zero damages. That is, Conwood's share increase (the variable selected by Leftwich) was *greater* during the injury period of 1990-97 than an equivalent nonviolation period of 1983-90,[5] and Conwood's share in fact declined in the yardstick market of smokeless looseleaf tobacco where USTC did not operate. JA 1147; *see* Pet. 7. *See generally Blue Cross & Blue Shield of Wis. v. Marshfield Clinic*, 152 F.3d 588, 592-94 (7th Cir. 1998) (Posner, C.J.).

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[4] Under both tests, the researcher selects a variable for performance (profits, growth or revenue) and compares the plaintiff's performance in the nonviolation market with its performance in the violation market. *See* P. Areeda & H. Hovenkamp, 2 *Antitrust Law* ¶ 391e, f; 396e, f (2d. ed. 2000).

[5] The record is undisputed that Conwood's nationwide market share increase during the 1990-97 violation period was 3.0 points (increasing from 10.6 to 13.6%) whereas it increased 2.9 points during the comparable 1983-90 nonviolation period (increasing from 7.7 to 10.6%). JA 2787; *see* Pet. 7. Thus, Conwood's performance in the moist snuff market actually exceeded its projected "but for" performance.

Conwood's attempt to demonstrate that its damages evidence disaggregated lawful from unlawful acts cannot stand scrutiny. It argues (i) that Leftwich said he intended only to measure unlawful conduct so disaggregation was unnecessary, and (ii) that this was confirmed by his test of suggested alternatives for which he had data. These propositions are contradicted by Leftwich's own theory and real world facts. First, if Conwood was too weak to resist USTC's conduct without a foothold in the low share states, it was similarly too weak to stave off inroads from Swedish Match's Timberwolf (and 11 other brands) that entered the market in the 1990s or the effects of lawful category management decisions by retailers to prune slower moving brands. Second, Conwood concedes that Leftwich did not test for the effects of any of these *most likely plausible alternative* explanations for Conwood's slower growth. *See, e.g.*, *Blue Cross*, 152 F.3d at 593 ("Statistical studies that fail to correct for salient factors, not attributable to the defendant's misconduct, that may have caused the harm of which the plaintiff is complaining[,] do not provide a rational basis for a judgment.") This Court should not condone bad science or encourage a failure to develop data necessary to support a damages study.

CONCLUSION

Ultimately, what should disturb this Court most of all is that the largest private antitrust judgment in history involved no cognizable antitrust misconduct and was based on a fanciful use of economic science designed to avoid established limits on antitrust damages.

For the foregoing reasons and those in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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